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CORRIGENDA.

Page 156, lines 7, 10, and 11 from foot, *for* "*Kiernan*" *read* "*Kieran.*"

,, 396, line 16, *after* "judgment," *add* foot-note :—The action of *Crawford* v. *Gillmor* was discontinued after the decision of the Court of Appeal (30 L. R. Ir. 238), and civil-bill proceedings were instituted, which were ultimately settled by payment. The case to which Johnson, J., here intended to refer was *Hayes* v. *Hunter* (Q. B. D., 30 Jan. 1888 ; C. A., 7 Feb., 1888)—[A.E.R.J.]

,, 559, line 3 of head-note, *for* "1890," *read* "1891."

,, 644, line 30, *for* "him," *read* "his enemies."

,, 722 foot-note (4) *for* "273," *read* "673."

,, ,, foot-note (5) *for* "R. & R. C. C., 225," *read* "1 Den. C. C. 38."

NOTE.

The Court of Appeal have affirmed the following decisions:—

IN RE BATESON'S ESTATE, [1895] 2 Ir. R. 559 (but upon different grounds), and MANLY *v.* YOUNG, *ib.*, 676; and have reversed the decision in BREW AND GLYNN, TENANTS; STACKPOOLE, LANDLORD, [1894] 2 Ir. R. 193.

In the Trinity Sittings, 1895, the Right Hon. Samuel Walker resigned the Great Seal; and the Right Hon. The MacDermot and Charles Hare Hemphill, Esq., Q.C., resigned their respective offices of Attorney-General and Solicitor-General. Thereupon Lord Ashbourne was appointed Lord Chancellor, the Right Hon. John Atkinson was appointed Attorney-General, and William Kenny, Esq., Q.C., was appointed Solicitor-General.

In the same sittings, the Right Hon. Samuel Walker was appointed a Lord Justice of Appeal.

In the Long Vacation, 1895, the Hon. Mr. Justice Harrison died.

CASES

DETERMINED BY

THE QUEEN'S BENCH AND EXCHEQUER DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1895.

MOONAN, Tenant; MARQUIS CONYNGHAM, Landlord (1).

Appeal.
1894.
May 9, 10, 16.

Land Law (Ireland) Act, 1881, *sect.* 58—*Residential holding—Estoppel.*

In 1849 the landlord demised to C. 86 acres of land in the county Meath, at a rent of £107. The term of the lease was to be calculated from 1845, since when C. had been in possession, and during which time he had improved the house previously upon the lands, so as to make it too good for the holding considered as an ordinary agricultural holding. The valuation of the land was £99, and of the buildings £30. C. lived chiefly in Dublin, and managed the holding by a steward. The lessee's interest in the holding was put up for sale by public auction, the advertisements describing the holding as a "charming residence," and adding, "the purchaser will be entitled, on the expiration of the lease, to have a fair rent fixed." The landlord's solicitor attended at the auction, having authority to bid £1200 for the interest in the lease. He saw the auctioneer previous to the auction, and told him that the landlord did not take the view that a fair rent could be fixed, that if the auctioneer stated

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(1) Before Walker, C., Sir Peter O'Brien, C.J., and Fitz Gibbon and Barry, L.JJ.

Appeal. 1894.

Moonan, *Tenant;* **Conyngham,** *Landlord.*

publicly in the auction-room that a fair rent could be fixed, he would have to dissent, but that he did not wish to spoil the sale. The auctioneer thereupon said he would not read the statement in the advertisement. M. saw the advertisement, and became the purchaser of the holding at the auction for £1600. On the expiration of the lease M. took proceedings to fix a fair rent:—

Held **(by Walker, C., and FitzGibbon and Barry, L.JJ.), that the holding was not a residential holding, so as to be excluded from the Land Law (Ireland) Act, 1881.**

Held **(by Sir Peter O'Brien, C.J.), that the landlord was represented by his solicitor at the auction, and that he was prevented from relying on the objection that the holding was a residential holding by the advertisement and what took place at the auction.**

APPEAL by the tenant from the order of the Irish Land Commission, dated the 22nd December, 1893, dismissing his originating notice seeking to have a fair rent fixed on his holding known as Castlepark in county of Meath.

As stated in the originating notice, the area of the holding was 86 acres 3 roods 30 perches statute measure; the rent was £107 7*s.*, the gross Poor Law Valuation £129, of which it appeared that £30 was on buildings and £99 on land.

By lease dated 5th October, 1849, the holding was demised by Marquis Conyngham to John Cornwall for a term of three lives or thirty-one years from 1st October, 1845, subject to a rent of £107 7*s.* In this lease the land was described as "that part of the lands of Slane called Castlepark, with the dwelling-house, offices and buildings of all kinds thereon, containing 53 acres 2 roods and 28 perches Irish Plantation measure, being 86 acres 3 roods 30 perches British statute measure, or thereabouts"; and the lessee was described as "John Cornwall (jun.), of Castlepark in the county of Meath, Esq."

John Cornwall, the lessee, assigned the lease, in 1885, to his nephew Captain Crosby. Captain Crosby was the son of Robert Cornwall, and had changed his name. He died intestate in 1889. His father was his heir, and took out administration to him, and thereupon set up the holding for sale by auction on 1st November, 1890. The advertisement of the holding and the proceedings at the auction form an important part of the evidence and are stated fully in the judgments. At the auction Moonan purchased the holding for £1600.

Robert Cornwall, the last surviving life in the lease, died in 1891; and the lease then expired. Moonan forthwith served an originating notice, seeking to fix the fair rent of the holding. The sub-commission dismissed the originating notice, on the ground that the holding was not an agricultural holding. The Land Commission affirmed this decision.

The tenant appealed to the Court of Appeal.

The history, description, and user of the holding appear from the judgments.

Serjeant Dodd, Q.C., and *Meredith, Q.C.* (with them *Macinerney*), for the tenant.

Gordon, Q.C., and *A. Murray*, for the landlord.

Cur. adv. vult.

Walker, C.:—

May 16.

In this case the sub-commission, of which Mr. Bailey was the legal member, dismissed the originating notice of the tenant, on the ground that the holding was a residential one. The head commission, over which, in the absence of Judge Bewley, Mr. Commissioner Fitzgerald presided, upheld that decision. I think both orders should be reversed, and the case remitted to the sub-commission to fix a fair rent.

The holding contains nearly 87 statute acres. It appears that possession of it was given to Mr. Cornwall—a predecessor in title of Moonan—in the year 1845. It then had a house upon it, which forms as improved a portion of the present residence, and it was stated that this house was of an inferior character. I have no doubt that Mr. Cornwall had some verbal promise of a lease, and that the making of it was deferred until he built the house and out-offices as they now stand, made an avenue, built a gate-lodge, and executed other improvements. It is stated his expenditure amounted to about £1600, and on the 5th of October, 1849, he obtained a lease for three lives or thirty-one years. The rent was £107 7*s.* and it went back to 1845, and is a rent measured on the lands only and would be about £2 per acre of the Irish acreage. Though the whole of the expenditure was the tenant's the lease demises the house and buildings to him, and, as the law stands, they must be treated as the landlord's property, and it must be held that the tenant took from him the holding as it was in 1849.

If the holding is a residential one it would probably be equally so if the tenant had converted it into such by his own expenditure after the lease so that it became and was a residential holding in 1881, and at the date of the originating notice.

The general description of the premises is the following:—The house is a two-storied one; it contains a drawing-room, a dining-room, and a breakfast-room, six bedrooms upstairs, kitchen, and pantries, two dressing-rooms. There is a garden surrounded by walls, which also form the road boundary. There is a plantation of two and a-half acres. There is a lawn in front of 3 acres separated from the rest of the land by a wire paling and sunk fence, and the house, garden, shrubbery, plantations and lawn comprise about seven acres of the entire holding. As regards out-offices, which were built by Mr. Cornwall, there is a coach-house, a stable with four stalls and a loose box, a cattle range of seventy-five feet by twelve, which includes tying for six cows. I see nothing unsuitable in the offices.

Mr. Cornwall only occasionally lived there. The lands were used for grazing and managed by a steward. The farm is just beside the residence of Lord Conyngham, and it is surrounded on two sides by a wall.

Such being the general character of the residence, the question is, first, whether the residence and its surroundings are such an overshadowing feature that they dominate the holding and deprive it of an agricultural or pastoral character. In considering this question I leave out of sight the fact that Mr. Cornwall was a gentleman, as I do also that Mr. Moonan is a cattle dealer. No doubt if Mr. Cornwall was not a gentleman he would not have incurred so large an expenditure on the house and offices as £1600, and I am willing to concede that the house is too good for a farm of the size; but what the landlord set and measured the rent on was the land. It is larger in area than any holding which has been yet held to be residential, and it is in the heart of Meath, and not a villa residence. The valuation is £99 for the land against £30 for the buildings. Good houses in Meath, in the hands of tenant farmers are by no means uncommon, and Mr. Everard, a witness, swore he had a better one. There is no covenant in the lease which stamps a residential character upon the holding, and on the whole, considering the rent, the valuation, and the area, I do not think the case is brought within *Carr* v. *Nunn* (1), and *Doyne* v. *Campbell* (2), and I look on it rather as a farm, with too good a house on it for its size, than a residence with some land attached for the purposes of the residence.

I bring in aid of this conclusion what occurred at the auction, which I shall presently state, and which I think is evidence against the landlord as acts and admissions of his in respect of the character of the holding. It appears that by reason of the death of the owner the place was advertised for sale, in 1891. The poster advertising the sale was as follows:—

COUNTY MEATH.

CHARMING RESIDENCE,
WITH NEARLY
100 STATUTE ACRES
Of the finest land in Meath.

Messrs. R. B. DALY & SON are favoured with instructions from the Representatives of the late CAPTAIN CROSBY to sell
BY AUCTION
AT THE ESTATE SALEROOMS, 30, LAWRENCE-STREET,
DROGHEDA,
On Saturday, the 1*st day of November*, 1890, *at One o'clock*,
THE DELIGHTFULLY SITUATED RESIDENCE OF
CASTLEPARK,
WITHIN ONE MILE OF SLANE,
With 91 acres, 3 roods, 30 perches, statute measure, of most superior land, all under fattening pastures.

DESCRIPTIVE PARTICULARS.

The Mansion-house is of modern structure, the fittings of the establishment being extremely good and complete. The stabling, coach-house, gate-lodge, gardens, tennis-lawn, vinery, etc., are in perfect order, situate in a good hunting district, and in the midst of lovely scenery.

Castlepark, containing 86 acres, 3 roods, 30 perches, statute measure, is held under lease, dated the 5th October, 1849, from the Marquis Conyngham, for three lives, one of whom is still in being, or a term of thirty-one years concurrent, subject to the yearly rent of £107 7*s*., sterling, together with a parcel of land known as "The Brickfield," adjoining above, and held in conjunction therewith, containing 5 acres or thereabouts, held from the same landlord from year to year, at the rent of £6.

The purchaser will be entitled, on the expiration of the lease, to have a fair rent fixed.

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(1) I. R. R. & L. App. 89.

(2) Ir. R. 9 C. L. 95.

Appeal.
1894.

MOONAN, *Tenant;* CONYNGHAM, *Landlord.*

Walker, C.

This advertisement cannot be split up for one side or the other. It was widely circulated and was read by, amongst others, John Moonan. Several bidders attended, and amongst others Mr. Barlee, the solicitor for the landlord, was at the sale. It will be observed that the age of the surviving life is not mentioned. Robert Cornwall the last life was aged 62, but the age was immaterial if a fair rent could be fixed.

Mr. Barlee went there with authority to bid up to £1200. I think it is wholly immaterial whether he did so or not. He also evidently had some authority from Lord Conyngham in reference to the question of its coming under the Land Act. Every man who went to bid had in view the thing as described. What occurred I shall take from Mr. Barlee's statement. He said in his evidence, 534:—"I saw Mr. Daly, senior, and I informed him that I had seen the allegation in the poster which has been proved here, that at the expiration of this lease for lives the tenant can have a fair rent fixed. I stated that such was not the view of the Marquis Conyngham, and that if he stated it in the auction room publicly I should have to object and dissent from it; but that I did not wish in any way to do so, as there was a valuable interest in the holding; there was one life, and I did not wish to spoil the sale, and he said under those circumstances certainly he would not read it, or have it read." 537. "Were you there watching?" "Certainly, for that purpose, that was one of the reasons." 542. "Had you any authority from the Marquis Conyngham to agree to any such agreement if it had been stated?" "I had no such authority. On the contrary." 562. "And did you see those slips of paper that were handed round?" "I did, it contained the same thing." 563. "And they were in the hands of the people at the auction?" "Yes."

Mr. Barlee knew that every man there was bidding under the impression that he would get a subject-matter within the Land Act, and what he did amounted to this:—that he told the auctioneer to keep silent on this the most material point in the whole sale. "Let them bid and buy while I am silent, and let them give the higher price; dont't spoil the sale; don't correct the prevailing impression conveyed by the poster." The sale accordingly was not spoiled, and Moonan gave £1600 for the holding, a purchase-money which never would have been given if Mr. Barlee had spoiled the sale, and told what he now, on behalf of the landlord, asserts is law. He said to the auctioneer, "Put it up as you represent it. I will stand by and hold my tongue." Thus he allowed a most material representation to be made in his presence, and every bidder acted on it. If he himself had knocked the place down to Moonan, how would it be? His silence both encouraged and confirmed Moonan's bid.

Mr. Barlee acted in perfect good faith. It is almost unnecessary to say that, having regard to his high character. But if the conduct was material it is an irresistible inference of fact that Moonan was induced to act by that conduct. It is not necessary to prove expressly that the party was actually induced. *Res ipsa loquitur.*

If it were necessary, I should be prepared to decide that Lord Conyngham could not now assert against Moonan that the holding is not what the poster describes it.

But I bring it in aid of the other part of the case, and on that hold that the holding is not shown to be not agricultural or pastoral and that the order of the Courts below should be reversed and the appeal allowed.

Sir Peter O'Brien, C.J. :—

I concur in the result arrived at by the Lord Chancellor. However, were it not for what took place at the auction, which is with me the determining factor, I own that I think the case would be beset with much difficulty. Having regard to the character of the house and its surroundings, lawn, and garden, and to the meagre character of the out-offices for farming purposes, and to the fact that the holding is, as Mr. Bailey says, all in a couple of fields through which a river runs, and to the planting and general amenity of the holding, and to the position of Mr. Cornwall, I should certainly have considerable difficulty in dissenting from the judgment of Mr. Commissioner Fitzgerald, and from the unanimous judgment of the sub-commission, all the members of which visited the place in person, and I attach considerable importance to seeing the place in dealing with such a question now before us. But what weighs with me, and, I own, weighs very much with me, is as I have already said what took place at the auction. Now what was that? Mr. Barlee came to the auction to bid for the place on behalf of Lord Conyngham. The place had been extensively advertised, and in the advertisement was this statement: "The purchaser will be entitled on expiration of the lease to have a fair rent fixed." This was a statement to the distinct effect that the place was not a residential holding, that it was an ordinary agricultural or pastoral holding. This statement of all others was most calculated to influence the bidding: it substantially affected tenure and rent. The thing advertised was an ordinary agricultural or pastoral holding. This is what the advertisement taken as a whole purported to describe, because the competency to have a fair rent fixed was absolutely inconsistent with the place being a residential holding, at least as the expression is understood in the administration of the Land Acts. Well, Mr. Barlee comes to the auction on behalf of Lord Conyngham. Previous to the auction, he sees the auctioneer; they have a conversation, and that conversation is thus described by Mr. Barlee, himself:—"I informed him that I had seen the allegation in the poster which has been proved here that at the expiration of the lease for lives the tenant can have a fair rent fixed; I stated that such was not the view of the Marquis Conyngham, and that if he stated it in the auction room publicly I should have to object and dissent from it, but that I did not wish in any way to do so as there was a valuable interest in the holding: there was one life, and I did not wish to spoil the sale: and he said under those circumstances certainly he would not read it or have it read." That he would not spoil the sale! How was the sale not to be spoiled? By allowing the all-influential statement in the advertisement as to fixing a fair rent to produce its natural effect. We are not concerned here with Mr. Barlee's actual intention. We must recognize the effect of what he did. He told the auctioneer as to Lord Conyngham's view as regards the competency to have a fair rent fixed. He did not then stop: he did not leave the auctioneer to determine his own line of action, but said to him, "Put it up, and if you say nothing about the fair rent, I will not interpose, I will not spoil the sale." Was not the effect of this to make it certain, to assure, that it was put up on the basis of the advertisement? I think this was the effect of what Mr. Barlee did, and if this was the effect of what he did, and if he represented Lord Conyngham, and I think he did, the latter should be bound by it, because otherwise a fraud, in a legal or equitable sense (I acquit Mr. Barlee of all moral blame whatever) would be perpetrated on Mr. Moonan, who plainly bid on the faith of the advertisement. What occurred was a public dealing with this place by Lord Conyngham, through Mr. Barlee, as a non-residential holding, of such a coercive character as ought, in my opinion to determine the controversy in favour of the appellant.

I have no doubt as to the effect of Mr. Barlee's action, but I confess I have some doubt whether Lord Conyngham can be affected by it. I think, however, that Mr. Barlee must be taken to represent Lord Conyngham at the auction. He went there at the instance and on behalf of Lord Conyngham. He dealt with the auctioneer on the basis that he would observe a certain line of action, a certain attitude with reference to the statement relative to the power to fix a fair rent; that it was competent for him to keep quiet—not to spoil the sale. He says that he was present for the purpose of watching with reference to this condition as to fixing a fair rent and for other reasons; and he was present at the auction when, though not so expressly stated in words, he must have known that the bidding proceeded on the basis of the advertisement. I think, on the whole, that there is evidence that Mr. Barlee represented Lord Conyngham *quoad* this auction, and therefore I concur in the result arrived at by the Lord Chancellor.

FitzGibbon, L. J.:—

I agree that this holding is within the Land Act of 1881. In reaching that conclusion, what is the question—and it is one of fact—that determines the issue? "Residential holdings" have been excluded from the Land Acts by judicial interpretation, as distinguished from express exception. They have come to be excepted as not answering the words of the Act of 1881, section 58, which provides that the Act "shall not apply to tenancies in any holding which is not agricultural or pastoral in its character." This provision assumes that each holding possesses a specific character, single and undivided—that it is *homogeneous*—and to bring the

Appeal.
1894.

MOONAN, *Tenant*;
CONYNGHAM, *Landlord*.

Fitz Gibbon, L. J.

holding within the Act its character must be agricultural or pastoral. "Residential holdings" are holdings possessing a specific character, but one which is neither agricultural nor pastoral, and the facts of each case must show the character of the holding to be "residential." Bearing in mind, therefore, that we have to deal with one homogeneous holding, I think the test of its being "residential," or "agricultural or pastoral," is to ascertain whether, as a whole, it derives its character from the land or from the house. If the land, as a thing to be worked for profit or subsistence—the land as a productive agent—is the predominating characteristic, the leading constituent, it follows that the character of the holding is agricultural or pastoral: if, on the other hand, the land derives its chief importance from the fact that it is the site of a house, if the holding is a place of residence rather than a farm, if the residence is the predominating element, then the character of the entire holding is "residential." That being the principle, how is it to be applied? What are the tests—what is the standard—by which we are to ascertain which of the two characters predominates in any particular case? In my opinion, every circumstance is to be considered, and the result will often be determined upon a balance of evidence.

But before going further, two questions are to be excluded from this case, because they have not been presented to us. First, we have the express declaration, in so many words, by counsel for the landlord, that this holding is not "demesne land." Secondly, neither here nor before the Land Commission was the question raised whether this holding was "let to be used wholly or mainly for the purpose of pasture." It is in a pastoral district; it is all in grass at present, and it has not been broken up for many years; but throughout the entire case the question of its being a pasture letting was never mentioned; and the case has been dealt with as one to which the express exception of lettings for pasture does not apply. Our decision, therefore, has no bearing whatever on "demesne" or "pasture."

Thus we are brought face to face with the question, What is the character of this holding? Treating it as a holding with a specific character, is that character "residential," or is it "agricultural or pastoral"? It cannot be treated as partly the one and

Appeal.
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partly the other; for the arguments have assumed that it has one predominating character, and the only question is—What is that character? In approaching that question it is difficult to find better guidance to a correct decision than in the judgment of Lord O'Hagan in *Carr* v. *Nunn* (1). "We have to regard the nature and extent of the property, the object with which the tenancy commenced, and the use which the claimant has made of the tenement, in order to determine the nature and character of the holding."

First, what is the subject-matter of the letting? The figures are of vital importance; the holding contains 86a. 3r. 30p.; the buildings are valued at £30, the land is valued at £99, the total valuation being £129; the rent reserved is £107 7*s*., about 20 per cent. less than the total valuation, and less than 10 per cent. above the valuation of the land alone. Before the contract for the lease, the dwelling-house was inhabited by a tenant about whom or whose house there was nothing to indicate that the place was anything more than an ordinary agricultural holding. Between the date of the contract for the lease and the actual execution of the lease—a period of four years—extensive alterations, additions, and improvements were made by the intending lessee. Comparing the old Ordnance Survey of 1836, which is none the less instructive because it is not quite certain that it is legal evidence, there appears to have been originally a square house on the place, to which a large addition was made, and ultimately the house and offices were so far enlarged and improved that the valuation on the buildings was fixed at £30, as against £99, the value set upon the land. Before the lease was made, as I understand the map, the place was laid out in three fields, with a garden round the house, and plantations lying together near the house. But the "non-agricultural" parts of the holding did not occupy, in all, more than about eight acres out of the eighty-seven which the holding contains; and seventy-nine acres of good productive grass land formed the rest of the holding, laid out, as land in that district usually is, in large fields or runs for feeding cattle and sheep. The main use and value of the property, therefore, was for feeding farm-stock.

(1) I. R. R. & L. App. 89.

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Such being the property, the matter next in importance is the lease. It does not contain any specific provisions leading one way or the other; but it describes the holding as "that part of the lands of Slane called Castlepark, with the dwelling-house, offices, and buildings of all kinds thereon." Therefore the land is primarily demised, and the dwelling-house and buildings thereon go with it. There is also a provision, which I think not immaterial, that the lessee shall not sublet or subdivide. I think this provision of importance. In one "residential" case: *Boggs* v. *Wallace* (1), there were two dwellings on the holding, the tenant lived in one, and made considerable sums by letting the other, separately from the land, as a summer or seaside residence. Again in *Waldron* v. *De Vesci* (2) there was evidence that the house alone could be let for £60, and proposals to take it for separate occupation as a residence were proved. But in this case the lease makes it perfectly clear that whoever occupied the land was to occupy the house, and *vice versa*, and that the house was never to become a separate holding. The lease contains some ordinary agricultural clauses, *e.g.* the covenant to keep the place in tenantable order: and there is an entire absence of the clauses specially suited to a residential holding, *e.g.* a covenant to insure. Therefore the contract of tenancy contains nothing to indicate a residential as distinguished from an agricultural or pastoral character. To my mind it is a most persuasive fact that, having regard to the circumstances of the letting and the improvement of the house, the rent of £107 7*s.* must have been regarded as issuing entirely out of the land, and it is calculated, almost to the penny, at the rate of £2 per Irish acre. In fact, we are almost driven to conclude that the house was left out of consideration altogether in fixing the rent.

I do not ignore the fact which impressed the Land Commission, that the house was made by the tenant a very different thing from what it had been at the date of the contract for the lease. But I must point out that this is a very dangerous principle to act upon, and we must be very cautious in applying it, in excluding holdings from the Land Acts. For it amounts to this—that though a landlord lets an agricultural holding as such, the tenant may deprive it of that character, and exclude it from the Land Acts, by expending his money too freely in improving his own residence upon it. I think the more just and rational inference is this:—That if the tenant, without otherwise altering the holding, merely makes the house in which he lives too good for the holding, he does not thereby change the character of the entire holding, even though he makes the house better than an ordinary agricultural tenant of the land would be likely to want. Under the Land Act of 1870 improvements not suitable for the holding are not the subject of compensation, but making unsuitable improvements is a very different thing from depriving the holding of the character which it previously had, and I fail to see how putting buildings on a holding let as a farm which, though not altogether requisite or entirely suitable, do not interfere with the user of the holding as a farm, can be held necessarily to alter the character of the holding. I conclude, therefore, that in this case the object of the landlord was to let his land, and the first object of the tenant was to work that land for profit, though he also wished to have a good house for himself upon it.

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(1) 27 Ir. L. T. R. 105.

(2) Unreported.—App. 20 and 21 June, 1892.

This brings me to the last of Lord O'Hagan's tests:—"The use which the claimant has made of the tenement." After Mr. Cornwall took this place, he continued to reside in Rutland-square. He only occasionally slept in the house on the holding. He did not make it his permanent residence, and he managed the place by a steward. A steward is not the sort of inhabitant whom I should expect to find upon a holding of which the character was so markedly residential as to overshadow and obliterate the agricultural or pastoral character which it previously had. Therefore, tried by all the tests suggested by Lord O'Hagan, the character of this holding is, in my opinion, agricultural or pastoral: or, at least I may put it in this way—the tenant has discharged the *onus* which, in the first instance, lay on him of showing that the holding is, *prima facie*, of an agricultural or pastoral character, and the landlord has failed to discharge the *onus* which was then thrown upon him, of showing that the character of the entire holding was residential.

I hold that what occurred about the auction overwhelmingly confirms the conclusion at which I would have arrived on the other grounds I have stated, and I use and rely upon it as confirmatory evidence of the strongest character. But I have two objections to make what was said and done at the auction the determining factor of my judgment. The first is, that if I rested my judgment solely on Mr. Barlee's action, it must follow that Lord Conyngham lost an advantage—I might even say lost a valuable piece of property—through the conduct of his solicitor, whose duty it was to guard his interests. But, secondly, I do not like to base my judgment on this ground alone, because it appears to me that if we make what occurred at the auction the deciding matter in the case, we can only do so upon the ground that Mr. Barlee knowingly and intentionally "kept in his sleeve" Lord Conyngham's intention to rely upon the residential character of the holding, while he permitted the bidders to raise the price upon faith of the statement that the holding was within the Land Act. I can give no other meaning to abstention from "spoiling the sale"; and I decline to impute to Mr. Barlee the intention of preventing the sale from being "spoiled" by knowingly allowing the purchaser to bid, and to pay for, an interest which he was not to get.

But while I decline to decide this case *entirely* on what Mr. Barlee said and did, I attach the greatest importance to what happened at the sale: for it appears to me to be most persuasive evidence upon the real issue—What was the character of the holding? When I find a holding advertised and put up for sale by public auction, with the express declaration that at the expiration of the lease the tenant will be entitled to fix a fair rent, and when it is brought home to the knowledge of the landlord that the holding is being so dealt with, and he sends his solicitor to watch his interests on the occasion, and authorises him to buy the thing so described, if he can get it for £1200, this is direct evidence against every man who saw or acted on that description, and especially against the landlord, who knew the place, that the holding possessed the character under which it was put up for sale. In that point of view, I have no difficulty about Mr. Barlee's authority. He was sent to the auction to represent the landlord, to watch the proceedings, to bid up to £1200 for the interest that was advertised for sale. He was so sent with knowledge of the "character" which the holding was asserted to possess, and it is idle to pretend that the purchaser bid £1600, or that Lord Conyngham would have given £1200, merely for the remaining term of a life whose age was not even stated on the posters. At the sale all parties, Lord Conyngham and Mr. Barlee included, dealt with the holding as one to which the Land Acts applied, and this is the best evidence to show that it was agricultural or pastoral in its character.

Having said so much about the case and given my reasons, I wish to say a few words about the judgments of the Sub-Commissioner, and of Mr. Commissioner Fitzgerald. Mr. Bailey appears to me to have forgotten that the entire holding, house and land, was admitted to be homogeneous. He quotes the Lord Chief Baron in *Doyne* v. *Campbell* (1) for "the most appropriate use" of the holding, and he quotes the passage, to which I have already referred, from Lord O'Hagan's judgment in *Carr* v. *Nunn* (2), and then he says that "the nature of the holding in this case points strongly to its being one of the class of holdings residential and not agricultural." But there has been no case in this Court, and there has been only one that I know of before the Land Commission, in which a holding at all approaching this one in acreage has been held to be residential. When Mr. Bailey says that "the most appropriate use" of this holding is "as a residence," he, with all respect, must be speaking of the most appropriate use *of the dwelling-house*, for he cannot say that the eighty-six acres of land were ever appropriately or at all used as a residence, and he ignores all the evidence derived from the extent of the place, the terms of the lease, the amounts of the rent and valuation, and the user by the tenant, as well as what happened at the sale. In fact he forgets the land.

Mr. Commissioner Fitz Gerald's judgment certainly is remarkable for its omissions. From beginning to end it contains no reference to what happened at the auction, and none to the statement in the "Bill of Particulars" that the tenant would be entitled to fix a fair rent on the expiration of the lease. He says: "It is suggested that the lease was given to Mr. Cornwall in consideration of the buildings and other improvements and changes

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(1) Ir. R. 9 C. L. 95. (2) I. R. R. & L. App. 89.

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which he had effected on the holding, and which the landlord contended had the effect of changing the character of the holding, and making its natural primary use that of a residence, and not that of a farm." I fail to see how the changes in the house could change the natural primary use of the land, or alter the character of the holding, as a whole, so long as the land remained the substantial portion of the holding, the portion on which the rent was fixed, and which remained the main, and in itself the sufficient, security for the rent of £107 7*s*. When the learned Commissioner refers to the advertisement, and says:—"Making every discount for the exaggeration naturally contained in such advertisements, it is impossible to shut out from our consideration that the statements in these advertisements show that in the opinion of the vendors the principal character of the holding, and its most appropriate use as a whole, was that of a residence" —he forgets the line at the bottom (which he does not read), stating that at the expiration of the lease the tenant will be entitled to fix a fair rent. Yet this is the line which raised the price to £1600. The judgment then proceeds:—"Now the present character and condition of the holding is the same that it acquired after the changes and improvements effected by John Cornwall after he got possession of it, before the letting under the lease was made to him. Taking all these facts into consideration, the inference we have drawn is that at the date of the lease the use of the entire holding as a residence was within the contemplation of both landlord and tenant, and that its most suitable use was as a residence, and that the use of the land for pasture or agriculture was subordinate to the use of the entire holding as a residence." I draw the opposite inference. The landlord fixed the rent, and made the lease, with a view to the land. The tenant's use of the house as a residence has always been subordinate to that of the land as a farm. Beyond going down to the place occasionally, from his residence in Dublin, and staying there occasionally, he has not used the house as a residence for any one except his steward, while he appears to have used the land to make his rent out of it, by working it as a farm with the help of his steward.

It cannot be too often repeated that, in cases of this kind, previous decisions are only of value for the principles which they state, but these principles must be consistently applied, even though the facts of one case throw but little light on the facts of another. In *Doyne* v. *Campbell* (1) there was a very large and handsome residence at Rathfarnham, close to Dublin, with twenty-five acres of land, of which ten acres were under plantation, ornamental grounds and garden, and the remaining fifteen acres were fenced pasture fields, in the same enclosure with the house, plantations, and ornamental grounds. I do not stop to go into all the particulars of the case, but the entire holding was in fact a villa residence, and I happen to know that it was often let as such for the summer months at a very high rent. *Carr* v. *Nunn* (2) and *Holmes* v. *Lawder* (3) are similar cases, though on a smaller scale. There are, in fact, only two cases where the facts bear the least resemblance to those of the present case. In *Spring* v. *Blennerhassett* (4) there were in the holding eighty-four acres, and the rent was £165, which contrasts with the rent here by being almost double the Government valuation. The Assistant-Commissioners thought the holding came within the Act, and fixed the fair rent at £120. Upon the rehearing by the Land Commission, evidence was given which satisfied two of the Commissioners that the tenant had not taken the place as an agricultural holding, but that he took the land only as subsidiary to the residence which was built on them. Mr. Justice O'Hagan dissented from his colleagues, and came to the conclusion that the holding was within the Act. In his judgment, he puts the matter as I think it should be put now:—"Unquestionably there have been decisions, with which I thoroughly concur, that if a holding be really and substantially a residence, with some land attached, still if the thing taken was the house, that being its real and substantial feature, the fact that there was some land as an accessory did not make that a pastoral or agricultural holding. Nevertheless, being bound to walk by my lights, I am unable to bring my mind and intellect to concur in the view that this holding is of the latter class. Here we have 84 acres of land, and a house in which a gentleman of the middle class might ordinarily live and manage the adjoining holding as a farm. Unquestionably it was a gentleman's residence, but the

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(1) Ir. R. 9 C. L. 95.
(2) I. R. R. & L. App. 89.
(3) 22 L. R. Ir. 47.
(4) MacD. 236.

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Act of Parliament has not in any place made any distinction between the class of persons who should be in occupation of the holding, so as to be agricultural or pastoral in its character. With respect to his belonging to the class of gentleman or peasant, although Captain Spring be a gentleman of excellent family in this county, still if he be in possession of what appeared to be substantially an agricultural or pastoral holding within the Act, though it might have a house on it in which a gentleman could live, I cannot find anything in the Act to exclude him."

With that passage I entirely agree. The position of the man is unquestionably to be considered, in determining whether he has taken the place as a residence, with land as an accessory, or has taken a farm with a residence upon it. But it is no more than evidence, and if a gentleman takes an agricultural holding, he is not to be put out of the Act because he makes the house on the holding more suitable for the residence of a gentleman than it would be for that of an ordinary tenant-farmer. Mr. Commissioner Litton, though differing from O'Hagan, J., does not venture to lay down any such principle as that adopted in the present case by Mr. Commissioner FitzGerald. He says:—"The question is simply whether the land was taken for the sake of the house, or was the house taken for the sake of the land."

There is not a shadow of evidence in this case that Mr. Cornwall would have taken this place without the land, or that the land was taken for the sake of the house. Having taken the land, he made the best he could of the house, but he used the land throughout just as he would have done if he had not enlarged the house. The ground upon which Mr. Commissioner Litton dissented from Mr. Justice O'Hagan, therefore, does not exist in this case, and even if it did, I should prefer to take the law as I find it stated by O'Hagan, J. But the case is important, as emphasising the letting, and as anticipating the principle stated in this Court in *Waldron* v. *De Vesci* (1). I quite agree with my brother Barry in wishing that we had some rough and ready means of doing justice in such cases, and of applying the Land Acts, according as we found that each particular tenant was or was not really justified in "posing" as an oppressed tenant, or was or was not really a

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(1) Not reported.

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farmer, earning his bread out of his holding. But such considerations, though open to us as evidence, are not decisive. We have to consider in each case whether the holding has got a particular character. Lord Ashbourne, in *Waldron* v. *De Vesci* (1), pointed out the elements for consideration, and I read some passages from Mr. DeVersan's note of his judgment, which is very applicable to this case:—" The size of the holding is 71 acres: the rent is £72. The acreage and rent indicate that the rent is an ordinary agricultural rent. As to the house, unlike other cases of the kind, no particulars were given by the evidence. . . . The lease entirely supports the view of the tenant. It contains only the ordinary agricultural covenants. . . . I think it is an ordinary agricultural holding such as a gentleman farmer might take. There is nothing to show that the house was not suitable for a holding of 71 acres. In all the alleged 'residential cases,' not one comes near the present acreage. *Carr* v. *Nunn* (2) is entirely distinguishable: it was a small holding." In *Waldron* v. *De Vesci* (1) I expressed myself somewhat in the same way as I have done here. In that case the house was not mentioned in the lease or shown on the map. I could see nothing in the house unsuitable for a man farming 43 Irish acres, and I concurred with the Lord Chancellor, having regard to the contract, to the extent of the holding, and to the paucity of evidence on the part of the landlord. But, in any view of it, *Waldron* v. *De Vesci* (1) was a far stronger case for the landlord, in my judgment, than the present case. I am satisfied that we cannot say that the parties have ever dealt with this holding as one of which the residence, as distinct from the land, was the predominating feature which gave its character to the whole. The land was used throughout for the purpose of production: it was stocked and grazed, and its working earned the rent. It did not lose its predominating character by the fact that the tenant made the house too good for an ordinary farmer, and occasionally lived in it as a gentleman. The house was not so much too good, was not so valuable or so large, as to change the character of the entire holding, and to obliterate the agricultural or pastoral character imparted to the place by the land.

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(1) Not reported.

(2) I. R. R. & L. App. 89.

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Barry, L.J.:—

If it was necessary for me to give a definite opinion as to whether, apart from the peculiar circumstances of the case this holding was in the judicial meaning of the word, "residential," I should feel very considerable difficulty. It is impossible not to be impressed by the arguments addressed to us by my colleague, Lord Justice FitzGibbon. In what he has said, I see much that requires, much that admits of, an answer. But, without going into the details of the case, I must say that irrespective of the special circumstances, I should have great difficulty in deciding that this holding was residential. The case seems to me to be very near the border-line, if we look at the purpose of the letting and at the character of the holding. For what purpose did Mr. Cornwall take the place? I should say he took it for a residence, and he expended his money on it to make it more fit for a residence. I can see nothing in the evidence to show that he took the place to work it as an agricultural or pastoral farm. Then, again, as to the character of the holding, Mr. Bailey and his colleagues saw the place, and, having personally inspected it, came to the conclusion that the character of the holding, was residential. In the purpose of the letting, and in the character of the holding, I see a great deal to make me hesitate in deciding that the case comes within the Land Act. But I do not propose to give any opinion on the question irrespective of what took place at the auction. The evidence of Mr. Barlee is simple, short, and frank. There is no mistake about it. I have no doubt that Lord Conyngham placed him in such a position as makes Lord Conyngham responsible for his acts, namely, attending the sale for the purpose of bidding for the holding. What was the understanding? What was the dealing between landlord and tenant? The tenant set up for sale a holding, putting forward a statement which every bidder would think vital—that a fair rent could be fixed on the holding. So important was the statement considered that it was not deemed necessary to state the age of the surviving life in the lease. This statement was an announcement by the vendor that he understood the holding was either agricultural or pastoral in its character. Further, this statement was brought home to the notice of Mr. Barlee, and through him to Lord Conyngham, and it is not denied that no measure was taken to prevent the bidders buying on the faith of the representation. Such was the basis on which the holding was dealt with between the parties, and, I think, their mode of dealing is almost conclusive evidence that the character of the holding is such as to bring it within the Land Acts. The proceedings at the auction possibly, are capable of being pressed further, but for the purposes of our decision it is not necessary to lay down that there is any estoppel on the landlord. There is no fraud here, no intention to do anything unfair. I acquit Mr. Barlee of the remotest idea that he was doing anything but performing a kindness to the Cornwall family in not "spoiling the sale." But it is not a question of intention at all. No matter what was *intended*, what was *done* affords cogent evidence as between the parties that the holding is of such a nature as to fall within the Land Acts. Having regard to what took place at the auction, and I confine my judgment entirely to this one ground, I am of opinion, that we must hold this not to be a residential holding.

Solicitor for the tenant: *James Smith.*
Solicitor for the landlord: *Arthur Lee Barlee.*

G. Y. D.

Q. B. Div.
1894.
Feb. 7, 8, 12.

TOBIN *v.* LONDON AND NORTH-WESTERN RAILWAY CO. (1).

(1893. No. 6073.)

Railway Company—Carriers—Delivery of goods—Reasonable time—Reasonableness of ordinary traffic arrangements—Contract—Evidence.

The defendant Company accepted cattle of the plaintiff at Liverpool at 1.30 a.m. for carriage to Manchester. These cattle left W'loo station at 3.40 p.m., and reached Manchester (by special train) at 10.10 p.m. The defendant Company published no time-tables of their arrangements for goods traffic, and the first ordinary goods train to Manchester by which these cattle could have been conveyed only started from Liverpool (W'loo) at 9.30 p.m.:—

Held, that the plaintiff could not recover for breach of contract to carry the cattle within a reasonable time.

Apart from special contract, a consignor is bound by the ordinary traffic arrangements of a Railway Company, whether published or not; and the reasonableness of such arrangements (which is a matter for the Railway Commission) cannot be submitted to a jury.

Where a Railway Company publishes no time-tables of goods traffic arrangements, the *onus* of inquiry lies upon the consignor, and where a consignor has delivered goods to a Railway Company for carriage under an open contract, representations made, subsequent to the making of the contract, by a servant of the Railway Company not proved to have authority to make such representations, are inadmissible in evidence to modify the contract.

New Trial Motion.

This action, which was for breach of contract to carry plaintiff's cattle from Waterford (2) to Manchester within a reasonable time, was tried before the Lord Chief Baron and a special jury on the 8th December, 1893. The facts, as given in evidence at the trial, were to the following effect.

The plaintiff, Edward Tobin, stated:—On the 23rd October,

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(1) Before Gibson and Madden, JJ.

(2) Until the trial both parties apparently acted under the assumption that the contract had been entered into with the agents for the defendant Company at Waterford.

1893, he shipped sixteen head of cattle from Waterford for Manchester. These he delivered to the Waterford Steamship Company, from whom he got a docket. He did not then pay any sum. The boat left at 7.30 a.m.; plaintiff arrived in Liverpool about 1 a.m. on the 24th. He there saw M'Cracken, defendants' agent, who was accustomed to take the cattle from the wharf at Liverpool to the train. The sixteen cattle were delivered to M'Cracken, about 1.30 or 2 a.m. Plaintiff found the cattle at 5.45 on the defendants' premises. They were in the Company's pens and were all right. There were empty trucks near the pens. Plaintiff went on to Manchester, and arrived there at 8.50 a.m., having left Liverpool at 7.45. The cattle only reached Manchester at 10.10 p.m. Plaintiff saw 5 cattle trains arrive before that hour from Liverpool. The cattle of a Mr. Fitzgerald, which had left Waterford with plaintiff, arrived at about 11 a.m. Plaintiff spoke of the delay to the defendants' manager at Exchange station, Manchester, who said he would wire. The market was the next day. When plaintiff's cattle arrived he put them into the lairs. [The plaintiff then gave evidence, not here material, as to the depreciation in the value of the cattle and the damage sustained by him.] (Cross examined). He did not know that the defendant Company had an agent in Waterford. He had booked the cattle in Waterford to go by the London and North-Western Railway Company. He thought the matter was all right when they were shipped through. The defendant Company had a time-table, but the plaintiff knew nothing about the time-table. On previous occasions the defendant Company had carried plaintiff's cattle all right. They did so some time in the same October, on a Monday. Fitzgerald's cattle arrived in Manchester about 11 a.m. He could not say how many head Fitzgerald had. He did not know from what station the other cattle trains arrived at Manchester. He did not look at the time-table. Previous experience had told him that the cattle would arrive at the proper time. He did not make any special arrangement with the Company. (Re-examined). Plaintiff's cattle were put in pens at the Waterloo Dock, Liverpool, the defendants' premises, and at 5.45 a.m., he saw one of the Company's servants walking up and down in charge of the cattle. There was no one in the booking-office. The plaintiff pointed out his sixteen cattle to the man, and asked him when they would be sent on to Manchester. The man answered, "There are the trucks for them; they will be sent on immediately, or very soon" (1). There were empty trucks there.

Evidence having been given as to amount of loss, and the plaintiff's case having closed, counsel for the defendants asked for a direction, on the grounds—1, that it was not shown that there was any ordinary train by which the cattle could have been taken on to Manchester sooner; and, 2, that there was no evidence of any act producing the alleged damage. The learned Judge declined to direct.

For the defendants, Francis Starke, cattle foreman at Waterloo station, stated:—He was not on duty when the boat arrived, but went at 9 a.m. to the cattle dock. At 3 p.m. he loaded the cattle in trucks. They had remained from 9 a.m. to 3 p.m. in the same pen where they had been fed and watered. The pens were in proper condition. Witness had the superintendence of this lot for the entire time. At 3 p.m., a number of trucks came into the station and witness then put the cattle into them. The cattle were loaded at 3.20, and at 3.40 p.m. the trucks left the station. Witness sent out of Waterloo, on this Monday, cattle belonging to one Fitzgerald that had come by the boat. He sent them by the 3.40 train and by no other train. The 9.30 p.m. train was the first which left Waterloo for Manchester in October which carried cattle. The 10 p.m. was the next; it took one hour and twenty minutes to Manchester. (Cross-examined). Stanley Market occurred every week; cattle were sent every day of the week from Liverpool to Manchester. Witness had known of cases of cattle arriving at Liverpool at 1 a.m. and not reaching Manchester till 10 p.m. Cattle arriving from Waterford were kept by the Company until 9.30 p.m., unless there was sufficient to make a special, and if there was sufficient to make a special, they were sent on as soon as possible. If they were on the Company's premises at six, and there were not a special, they would get away about nine. Not more than one special train a-day was sent from Waterloo. Cattle arriving at Liverpool, and delivered to the

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(1) Objection to this evidence was taken by counsel for the defendants.

Company at 1 a.m. were not in the usual course sent on to Manchester. These cattle were sent forward at 3.40 p.m., so as to give them a chance of arriving as soon as possible. Seven or eight trucks were enough for a special, eight or ten cattle going to a truck. When witness came on duty there were only two lots of cattle at the dock. He had to wait for trucks, there not being sufficient. He loaded three empty trucks, and dispatched these at 11.30 a.m. That was not an ordinary train, but was to be attached at 8.10 to a Yorkshire special. It was the constant course to attach wagons to another train. It was not in consequence of anything said that witness sent on the 3.30 special. (Re-examined). The bulk of cattle that came over on Monday are for Stanley Market, and do not come into Waterloo. It is a large market, and a number of trains run from Stanley to Manchester, without going through Edgehill. The defendant Company had an agent at Waterford, Mr. Fitzgerald. Witness had sufficient wagons at Waterloo to meet the ordinary traffic on a Monday. (To the Judge). It was by witness's direction that the special train was sent on. There were four or five hundred cattle to be sent on then.

Mr. Hewitt, defendants' cattle-agent at Liverpool, stated:—The Stanley Market of the 24th was a very heavy one. Three to five wagons was the ordinary amount of traffic from Waterloo on Mondays. In working cattle traffic on this line regard must be paid to the cattle traffic from Stanley. It was necessary to pass through Edgehill to get to Stanley, and there was a tunnel, about half a mile long, between Liverpool and Edgehill. If the Company had advice on the day before they could by special arrangement have sent a train from Waterloo to Manchester, without passing through Stanley; but, without previous arrangement, this would have been impossible. There were 257 truck-loads from Stanley that day. There could not have been a special from Waterloo that day, owing to the number of specials from Stanley, which, experience showed, would be necessary. The rolling stock was engaged at Stanley up to 7 p.m., carrying away as fast as was possible, and at 7 p.m. these wagons (containing plaintiff's cattle) were hooked on and forwarded. They had arrived at Stanley at 6.45. Special trains are sent, but not without delay, unless previous advice was given, and when no previous advice was given, the Company did what best it could. It had not been the practice to send on a special with forty-five head of cattle without previous advice, and when there was no previous advice, the Company sent on in ordinary course by the 9.30 p.m. train. (Cross-examined). Three to five wagons form the ordinary traffic on a Monday from Waterloo to Edgehill. That is the normal number on the 9.30 p.m. train. The foreman's instructions are to load the cattle so as to catch the last Stanley cattle train. The ten wagons were sent on from Stanley to Waterloo, at 1 p.m. [Witness produced the Company's time-table.] This time-table was supplied by the Company to their own servants, and was not the public time-table; there were no public time-tables for goods trains. Special trains were never started unless special arrangements were made. Such arrangements were sometimes made verbally, sometimes by telegram. The arrangement would depend on the number of cattle. A special would be started if there were sufficient for eight or ten wagons. The 3.40 was an ordinary train, that is, not mentioned in the book; it was the ordinary train by which cattle were brought from Waterloo to Edgehill, where the cattle and goods trains were made up. The train runs a dozen of times a-day. It was not a special train. The time-table did not show the short trains from Waterloo to Edgehill; there was one at 11 a.m., another at 1 p.m., another at 3.50. These could take wagons if the wagons were there. The reason these cattle were not taken on was that there were not wagons at Waterloo. There was no advice necessary for any of these trains. There was no traffic train from Edgehill to Manchester till 9.30 p.m. on any day of the week. (Re-examined). The practice was to run on to Stanley, in time for last Manchester train on a Monday, any cattle there were for Manchester. They were brought from Waterloo by an engine, and at 9.30 a train left Edgehill. No special train left Waterloo without advice or special arrangement. The Company should have had a message from Waterford on Sunday morning, and would have made special efforts for trucks. (To the Judge). The cattle would not have arrived earlier if it had been any other day but Monday; but, if it had not been Monday, it would have been easier to have made arrangements for a special.

Shegog, brakesman, took the special cattle train from Edgehill to Stanley, on the 24th of October. He arrived at 6.10 and and left at 7.40 by special train from Stanley. Plaintiff's cattle were attached to the train at Stanley.

Edward Donnelly, cattle driver, drove the cattle from the wharf to the pens at Waterloo. Plaintiff's lot and Fitzgerald's (29) were treated in the same way. (Cross-examined). Witness worked under M'Cracken, he took up the cattle at 1.30 a.m. and reached Waterloo at 2.30 am. He saw three wagons standing opposite the pens, where he placed the cattle. He loaded the cattle at 3.30.

The plaintiff then entered into a rebutting case, and, being recalled, stated that he sent cattle by this route on either the 10th September or 10th October. These were booked in the same way as the present consignment. Witness arrived at Liverpool about 2 a.m. on that occasion. He could not say when the cattle left Waterford, but they reached Manchester between 1 and 2 p.m. This he saw himself. He could not say that he had sent on other cattle by a Sunday boat. In December, 1891, he sent cattle by a boat on Saturday. These were delivered to the Company at 7 a.m. on Sunday morning, and arrived on Sunday night at 10 p.m.

Starke (recalled) produced consignment-book. The plaintiff did not forward any cattle to Waterloo for Manchester on 10th October or 10th September. When the Company got no advice from Ireland for a special, the practice was to send by the Waterloo train. The advice was necessary that the Company's servants might telegraph for wagons, and other matters. It was not sent out at all unless there was sufficient to make up a special. (Cross-examined). Whenever there were sufficient cattle a special train was sent out. Witness sent on these cattle by the 3.40 to join a special from Stanley. (To the Judge). If there were sufficient cattle for a special, for which the Company had received no advice, witness could order a special, that is, he could telegraph to the manager at Edgehill. He did not telegraph to the manager at Edgehill in this case, because he had no wagons. In the ordinary course, if there were sufficient for a special, and no advice and no wagons, witness would have to wait for wagons, as in this case. He telegraphed for wagons in this case as soon as he came in in the morning. When there was no advice, but where there was sufficient for a special, the ordinary course was to send cattle on, according as there were or were not wagons.

Counsel for defendants having again applied for a direction, the Lord Chief Baron stated that, in his opinion, there was no evidence that the defendants professed to carry, or held themselves out to carry, by any train earlier than the 9.30 p.m. from Edgehill, unless either a special train had been arranged for, or they had advice that sufficient cattle for a special train were coming. He accordingly directed a verdict for the defendants, on the terms of defendants' counsel consenting to a verdict being entered for the plaintiff, with damages assessed by the jury, in case the question should have been left to the jury whether the cattle were delivered at Manchester within a reasonable time. *O'Shaughnessy, Q.C.*, for the defendants, having consented to this course, the question of damages was left to the jury, who assessed them at £61 10*s.* 9*d.*

The plaintiff now moved to set aside the verdict, on the ground that same was entered by misdirection of the learned judge inasmuch as there was evidence, which ought to have been left to the jury, that the plaintiff's cattle were unreasonably delayed on the journey from Liverpool to Manchester by the defendants, and that the defendants did not carry the said cattle from Liverpool to Manchester within a reasonable time, and that the verdict for £61 10*s.* 9*d.* found by the said jury should be entered for the plaintiff pursuant to the leave reserved.

J. Roche, Q.C., and *M. B. Cooper*, for the plaintiff:—

The contract, constituted by the delivery of plaintiff's cattle to the defendants' agent M'Cracken, in Liverpool, was an open one, (*Taylor* v. *Great Northern Railway Company* (1)), to carry the cattle within a reasonable time. The defendants' conduct in the carriage of the cattle was unreasonable and negligent. There was evidence to go to the jury that Fitzgerald's cattle arrived at an earlier hour in Manchester. The Company should have had ordinary goods trains running at more convenient hours. They should have had sufficient trucks on the spot, or should have used diligence in procuring them: *Donohoe* v. *London and North-Western Railway Company* (1). Taking Fitzgerald's twenty-nine cattle and plaintiff's sixteen, the defendants had sufficient cattle to make up a special, and should have sent the cattle on by a special, this being their profession. The three trucks at Waterloo were appropriated to, and should have been used for, plaintiff's cattle: *Wallace* v. *Great Southern and Western Railway Company* (2). The delays upon the route, after the train actually started at 3.40 p.m., were unreasonable, an hour's journey taking 6½ hours.

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(1) L. R. 1 C. P. 385.

"Reasonable time" is in all cases a question for the jury, and must be tested apart from public profession, otherwise a Railway Company could secure itself against any liability for delays of trains. Upon this see *Donohoe* v. *L. & N. W. Ry. Co.* (1); *Hales* v. *L. & N. W. Ry. Co.* (3); *M'Nally* v. *L. & N. W. Ry. Co.* (4). The question here is, not what was the Company bound to do in the matter of special trains, but was the question of reasonable time one for the jury, and was there evidence on this point sufficient to be left to the jury?

The statement of the Company's servant was admissible in evidence to explain the contract, and to explain, in the absence of time-tables, the profession of the Company. The plaintiff had no other means of learning when the cattle would be forwarded, and acted upon the faith of the statement so made. Upon this see *Pickford* v. *Grand Junction Ry. Co.* (5); *Ellis* v. *Thompson* (6); *Anderson* v. *C. & H. Ry. Co.* (7); *Page* v. *Gt. N. Ry. Co.* (8); *Giles* v. *Taff Vale Ry. Co.* (9); *Ruddy* v. *M. Gt. W. Ry. Co.* (10).

O'Shaughnessy, *Q.C.*, and *Smyly* (with them *Seymour Bushe*, *Q.C.*), for the defendants:—

The contract was an open one; the plaintiff made no inquiries from M'Cracken, or any responsible agent of the defendants as to the starting of trains; the statement of a mere railway porter, made subsequent to the making of the contract, could not bind the Company by turning the general contract into a special one, and was not admissible in evidence: *Gt. W. Ry. Co.* v. *Willis* (1). The cases cited for the plaintiff are distinguishable.

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(1) Ir. R. 1 C. L. 304.
(2) 17 W. R. 464.
(3) 4 B. & S. 66; 32 L. J., Q. B., 292.
(4) 26 Ir. L. T. R. 138.
(5) 12 M. & W. 766.
(6) 3 M. & W. 445.
(7) 4 Ir. C. L. R. 435.
(8) Ir. R. 2 C. L. 228.
(9) 2 Ell. & Bl. 822.
(10) 8 L. R. Ir. 224.

In order to avoid the difficulties exemplified in *Denohoe's Case* (2), the Company have now no public time-tables for goods traffic, and do not profess to have fixed hours for the departure of cattle trains. The contract was a general one to carry from Liverpool to Manchester within a reasonable time. The plaintiff did not at the trial allege that the delays *en route* after 3.40 p.m. were unreasonable, and gave no affirmative evidence that there was previously any delay that was unreasonable; for, upon the evidence, in the absence of advice, the Company do not profess to carry by special trains, and are not bound to convey cattle by any but their ordinary goods trains; and the evidence for the defence demonstrates that it was, under the circumstances, and on the day in question, impossible for the Company to do more than was done by them.

The defendants were entitled to a direction upon this question of reasonable time. Upon this see *Sims* v. *Gt. N. Ry. Co.* (3); *Johnson* v. *Mid. Ry. Co.* (4); *Bellamis* v. *M. and L. Ry. Co.* (5); *Denaby* v. *M. S. and L. Ry. Co.* (6); *L. and Y. Ry. Co.* v. *Greenwood* (7); *Y. N. and B. Ry. Co.* v. *Crisp* (8); *M'Nally* v. *L. & N. W. Ry. Co.* (9). "Reasonable time" is a matter which must depend upon the public profession of the Railway Company. Where the Company does not profess to start trains at any fixed hour, a jury cannot arrogate the functions of the Railway Commission and decide that trains should be run between certain stations more frequently, or at hours which might happen to be more convenient for a particular passenger, or consignor of goods.

M. B. Cooper, in reply.

Cur. adv. vult.

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(1) 18 C. B. (N. S.) 748.
(2) Ir. R. 1 C. L. 304.
(3) 14 C. B. 647.
(4) 18 L. J. Ex. 366.
(5) 15 Ir. C. L. R. 560.
(6) 11 App. Cas. 97.
(7) 21 Q. B. Div. p. 219.
(8) 14 C. B. 527.
(9) 26 Ir. L. T. R. 138.

GIBSON, J. :—

The principal question argued in this case was, what was the standard by which reasonable time for the carriage of goods was to be measured, where the Company publish no time-table or advertisement of trains, and the consignor is ignorant of the Company's traffic arrangements. The point is of great importance. If the plaintiff's main contention is right, a customer, by omitting to inquire as to the times and course of trains (which do not, in the case of goods traffic, usually appear in any published time-tables), can have the ordinary business of the carrying Company revised and regulated by a jury, who may feel better qualified to pronounce a decision than a mere traffic manager, or the Railway Commission. On the other hand, if the view presented on behalf of the defendants be correct, traffic arrangements really of an elastic character may be unconsciously represented, under the pressure of litigation, in such a way as to screen real negligence, and evade just claims.

The cause of action disclosed in the pleading is against the defendants as carriers (not common carriers) on a contract based on an executory consideration to carry sixteen cattle from Liverpool to Manchester, and there deliver the same within a reasonable time; non-delivery within such reasonable time being averred as a breach, and consequent loss to the plaintiff. The statement of claim did not allege any negligence in the carriage, or that the defendants had contracted to carry safely and securely, and no liability of this kind was suggested at the trial.

The facts were as follows:—The plaintiff consigned sixteen head of cattle from Waterford to Manchester by what he mistakenly understood to be a through booking, an error on his part which has perhaps led to the present litigation. The cattle reached Waterloo on the 24th October, at 1 a.m., and the plaintiff delivered them to M'Cracken, the defendants' agent, for carriage to Manchester. There was no written contract, but it is a common case that the contract sued on was constituted by the delivery to, and the receipt by M'Cracken, on behalf of the defendants: *Malpas* v. *London & South Western Railway Co.* (1). The cattle were put into pens at the dock, and at 5.45 a.m. the plaintiff saw a man, whom he describes as a servant of the Company, in charge of the cattle. There was no one at the time in the booking-office, and Tobin asked the man when the cattle would be sent on to Manchester. The man, pointing to some trucks, replied that the cattle would be sent immediately, or very soon. This conversation was objected to, and was not, in my opinion, admissible in evidence. In the first place, the contract had been completed several hours before, when the Company's agent got the cattle. In all the cases cited by the plaintiff's counsel on this point, it will be found that the statements admitted were at the time of the making of the contract by persons who were held out as agents of the Company to make the contract, and whose authority could not therefore be repudiated. The case of *Great Western Railway Co.* v. *Willis* (1) shows the distinction between a statement made at the time of the contract and a statement made afterwards: see also *Betham* v. *Benson* (2). A further and equally fatal objection is that there is no evidence as to the position and duties of the servant, or that he was held out in any way as a person to answer inquiries as to trains, &c. From the duty he was engaged in he was obviously a subordinate of low rank. If the remarks made by every stoker or other underling are evidence on which a jury could be permitted to upset the ordinary traffic arrangements of a Company as unreasonable, no Company would be safe. Casual conversations alleged to have taken place with anonymous subordinates might raise a question for the jury in every case. The plaintiff here, when making the contract, ought to have inquired from M'Cracken, or some other responsible official, as to the hour when the cattle would arrive. The conversation cannot become evidence merely from the accident that at that particular moment there was no one in the booking-office. The plaintiff was at Waterloo apparently four hours before, and two hours after, this dialogue with the servant; and there is no suggestion that, had he so desired, he could not have obtained accurate information from some one whose answers would have bound the Company. He probably did not ask, from some erroneous idea that there was a through

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(1) L. R. 1 C. P. 336.

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(1) 18 C. B. (N. S.) 748.

(2) Gow, 45.

Q. B. Div.
1894.

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Railway Co.

Gibson, J.

contract of carriage. Without any further question, he started from Waterloo at 7.45 a.m., leaving the cattle behind him, still in pens, though two hours had elapsed since the unknown servant had assured him that they would be sent on immediately. Before his cattle arrived in Manchester (which was at 10.10 p.m.) the plaintiff saw five other cattle trains arrive; but this is immaterial, as he could not prove from what stations they came. The plaintiff, however, adds that the cattle of a man named Fitzgerald, which had come over in the same boat, arrived in Manchester at 11 a.m., and this is strongly relied upon. From the defendants' books it appears that this statement is certainly a mistake, as Fitzgerald's cattle were sent on with the plaintiff's at 3.40 p.m. Fitzgerald (who had consigned other cattle immediately before) was not examined, and it would be difficult for the plaintiff to identify any particular lot of cattle belonging to another man. Assuming, however, the evidence to be true and accurate, it is consistent, as it stands, if taken by itself, with the cattle having been brought to Stanley, and sent thence by an ordinary cattle special, without coming through Edgehill, or with a special arrangement having been made with Fitzgerald, or with the hypothesis that there might have been wagons enough for Fitzgerald's cattle (the number of which is not proved by the plaintiff), though there were not sufficient for the plaintiff's cattle.

Further evidence having been given as to the injured condition of the cattle, the plaintiff's case closed, and the defendants' counsel asked for a direction, which the learned judge declined to give. Whether, if the evidence of the conversation with the servant, and the statement as to Fitzgerald's cattle were struck out, there was a case for the jury on the remaining evidence, may be a matter of some doubt. In cases of this character it is the usual, if not invariable practice, for the plaintiff to give affirmative direct evidence to show negligence and departure from the ordinary traffic arrangements in point of time or otherwise. Possibly a delivery may be so late as of itself to furnish some inference of undue delay. Here on the plaintiff's case there was no direct evidence as to the proper duration of the journey for a cattle train, or as to any of the train arrangements of the Company. I need not pursue the point, as the defendants went into evidence, and our decision must depend on the case as a whole, as it stood when the defendants' case closed.

The following is an outline of the facts proved on behalf of the defendants. The largest part of the cattle trade is in connection with Stanley Market, a place lying two or three miles outside Liverpool. Cattle can be driven to it from the steamer. Several special cattle trains are run during the day between Stanley and Manchester. The direct business between Waterloo and Manchester is small, and three or four trucks are adequate for a normal day's business. One regular cattle train runs to Manchester each day, leaving Waterloo after 9 p.m., and Edgehill (according to Mr. Hewitt) at 9.30 p.m., and reaching Manchester, in 1 hour and 20 minutes, apparently at 10.50 p.m. In order to get a special train, either direct or *via* Stanley, there must be a previous arrangement with the consignor, or a previous advice; but it would appear that, notwithstanding the absence of such advice, where there are cattle sufficient to fill a special—that is seven or eight trucks containing eight to ten head each—and there are trucks available for the purpose, a special is also sent.

It is obvious that such last-mentioned special must be to some extent within the discretion of the Company; that it must be subordinate to existing traffic arrangements, and that the times of departure and arrival must be necessarily uncertain. There are several trains each day between Waterloo and Edgehill, a short distance of two miles. Cattle, however, destined for Manchester, have to be sent back from Edgehill to Stanley to be attached to the special running thence to Manchester, if there is no direct train to Manchester. The Stanley traffic goes to Manchester direct without passing through Edgehill. On October 24th there were the usual number of trucks at Waterloo for ordinary traffic, but not enough for the cattle destined for Manchester, forty-five head in all, of which sixteen belonged to the plaintiff, and twenty-nine to Fitzgerald. At 11.30 a.m. three trucks were sent to Edgehill with cattle for the Yorkshire special to Wakefield, but there were not sufficient for the Manchester cattle. Had there been enough wagons, the cattle would have been sent on *via* Stanley, notwithstanding that there were only five truck loads. In consequence of the pressure at Stanley no wagons could be sent from there till 1 p.m., though they were telegraphed for several hours before. They reached Waterloo at 3 o'clock p.m. in time for the ordinary train starting for Edgehill at 3.40 p.m. Between Edgehill and Stanley the trucks were apparently sent on by special. They arrived at Stanley at 6.40, left at 7.40 p.m., and reached Manchester at 10.10 p.m., in good time, at least 40 minutes before the ordinary 9.30 train from Waterloo could have got in. Some rebutting evidence was offered by the plaintiff as to previous consignments, to which I attach no importance. Even assuming that the traffic arrangements were the same (though this is not proved), it does not appear, on the occasions referred to, what was the day of the week—a matter of essential importance—or whether there were enough cattle and wagons to secure a special. On one of these occasions the cattle arrived at 10 o'clock, p.m.—a circumstance which should have put the plaintiff on inquiry.

At the close of the case the Chief Baron directed a verdict for the defendants, on the ground that there was no evidence that the defendants professed to carry by any train earlier than 9.30 p.m., unless a previous arrangement had been made or advice sent, the defendants' counsel consenting that, if there was any evidence, the verdict should be entered for the plaintiff for the damages assessed by the jury. I should infer that the learned Judge was of opinion that the evidence of conversation, which he had admitted, ceased to be relevant when the nature of the defendants' public profession as carriers had been established. The form of reservation shows that no question as to the truthfulness of defendants' witnesses was intended to be raised.

The main question argued before us was whether the reasonable time for delivery was to be estimated with reference to what is called the Company's public profession as carriers, and whether, in a case where traffic arrangements are not published, the *onus* of making inquiry rests on the customer. Upon these points I have no doubt. The consignor is bound to inquire as to trains and hour of arrival, and cannot, by omitting to do so, enhance the obligation of the carrier, or submit the reasonableness of their ordinary traffic arrangements to the review of a jury. Juries would of course take different views, according to the train service of their locality; and, if the management of goods traffic depended on their decision, it would become a chaos, resulting in the ruin of the Company under an avalanche of litigation. Whether he inquire or not, every customer dealing with a Company is bound not only by the ordinary route (*Hales* v. *London North-Western Railway Co.* (1)), but also by the ordinary train arrangements and hours of arrival according to which they profess to carry. This is distinctly laid down in the judgments in *Bollands' Case* (2); and my own decision in *M'Nally's Case* (3) is to the same effect. If trains are too few or too slow the remedy is not by appeal to a jury but to the Railway Commission. *Donohoe's Case* (4) is quite different. There was a through booking, and there was evidence of breach of contract to convey according to the public advertisement of trains. The Court did not question the opinions expressed by the Queen's Bench in *Bollands' Case* (2).

Feeling the force of this difficulty, plaintiff's counsel placed their main reliance on the conversation with the anonymous railway servant, which they said was explanatory of the contract made with the Company's agent M'Cracken four hours previously, and which afforded the jury an indication of what was the Company's profession, and what was or ought to be the reasonable time of carriage. I have already stated my reasons for holding that this evidence was not admissible; and I need not therefore consider whether the evidence, if admissible, was not displaced (as the learned Judge obviously held) by the specific evidence of the defendants' witnesses as to the ordinary trains and course of traffic. Nor, for the reasons already given, can any dependence be placed on the statement as to Fitzgerald's cattle, or the previous dealings of the plaintiff with the Company. If a verdict depended on the evidence as to Fitzgerald, which the learned Judge treated as disposed of by the defendants' evidence, the case should go to a new trial, notwithstanding the consent and form of reservation, as I think the statement of the plaintiff is clearly mistaken.

Two other arguments were brought forward which require notice. The first of these relates to the period before the departure of the cattle by the 3.40 p.m. train. It is contended that though a consignor may be bound where the carriers carry by fixed settled trains, there is evidence here that the traffic arrangements of the Company were flexible; that, if they had wagons enough, they would, notwithstanding the absence of any previous arrangement or advice, and notwithstanding that there were only five truck loads, have sent on a special *via* Stanley; and that by the exercise of reasonable diligence they could have procured the necessary wagons. I agree that there is evidence that the Company would have sent the cattle by an earlier train if they had had sufficient trucks, though there may be a question whether they were legally bound to do so. It is, however, proved that no additional trucks could be procured, though telegraphed for, in consequence of the pressure at Stanley, from which 257 truck loads were despatched that day. There was no cross-examination directed to show that wagons could have been got. In the absence of previous advice, the Company were not bound to have at Waterloo any greater number of trucks than what would be sufficient for the normal traffic which might be anticipated that day: *Nevin's Case* (1). From the immense resources of this Company it is hard to avoid suspecting that by extra efforts sufficient wagons could not have been obtained, and this has caused me more doubt than any other point in the case—a doubt which still lingers. The evidence, however, is the other way; and there is not enough to fix the Company with liability for delay in not sending the cattle on before 3.40 p.m. This delay had (so far as I can see) nothing to say to the plaintiff's loss, which seems to have resulted from the cattle having been kept standing in the trucks on their 5½ hours' journey to Manchester.

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(1) 4 B. & S. 66.
(2) 15 Ir. C. L. R. 560.
(3) 26 Ir. L. T. R. 138.
(4) Ir. R. 1 C. L. 304.

This brings me to the second argument, which at first impressed me, though I now regard it as unfounded. It is suggested that the 3.40 train was unduly dilatory in its course; and that the plaintiff's cattle would not have been injured had they been sent by the 9.30 p.m. fast train. But, in the first place, the cause of action is for late delivery in Manchester, and the 3.40 train, slow though it was, arrived there before the 9.30 train. The 3.40 train was not direct like the 9.30 train, but was in connection with the 7.40 p.m. train from Stanley. There was no delay between

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(1) 30 L. R. Ir. 125.

Stanley and Manchester, and the 7.40 train was in good time. Whether the 3.40 train was fast or slow in reaching Stanley, it would not have affected the time of arrival in Manchester. There was no point made at the trial (as I have ascertained from the Lord Chief Baron) as to there being any cause of action in consequence of the delay of the 3.40 train, the only case made being that a delivery in Manchester at 10.10 p.m. was late, having regard to the fact that the contract was made at 1.30 a.m.

Had any case been open on the pleadings, or been suggested at the trial, that the delay of the 3.40 train between Waterloo and Stanley imposed responsibility on the Company, the defendants might have called evidence to explain that in consequence of the line not being clear—shuntings and other difficulties—it was impossible to get to Stanley sooner. It is quite a fallacy to adopt the time of the 9.30 train in getting to Manchester as a standard of reasonable time in the case of a special. The former was a fixed ordinary train, the time of which could be, and was, settled beforehand, the traffic being so adjusted as not to interfere with it. The latter was an emergency train, subject to inevitable delays from the necessity of avoiding collision with the complicated mechanism of existing traffic. In taking on the plaintiff's cattle by the 3.40 train the Company, no doubt, thought they were acting for the best. If the plaintiff considered he had a grievance because the cattle were sent on by a slow train instead of a fast one, he should have applied to have the pleading amended, and made that case at the trial. There was, however, no application to amend, or attempt to make the defendants liable for breach of any obligation to carry safely and securely. It was probably in consequence of the telegrams sent from Manchester at the plaintiff's instance that the cattle were forwarded by the 3.40 train and not by the 9.30. The plaintiff's loss appears to be attributable chiefly to his omission to advise the Company beforehand, partly to his mistaken notion that the cattle were in some way booked through, and in some degree to his reliance on the servant's assurance. On the whole, in my judgment, no case of actionable delay has been proved against the Company; and the direction given at the trial cannot be disturbed.

The entire cause of action, both contract and breach, took place in England (1), but no remark was made by counsel in reference to this point, as to which therefore I say nothing.

Madden, J.:—

Since the conclusion of the argument in this case I have had the opportunity of discussing it with Mr. Justice Gibson; and, as our views upon all points raised are absolutely identical, I did not think it necessary to prepare an independent judgment. Indeed it must be apparent that nothing could be usefully added to the judgment which has just been given.

Solicitor for plaintiff: *Edward Burke.*
Solicitor for defendants: *A. Cullen.*

A. E. R. J.

LYONS and ANOTHER *v.* KEARNEY (2).

Ex. Div.
1894.
June 12.

Judgment entered up prior to the 15*th July*, 1850—*Assignment—Enrolment—Execution*—Elegit—*Practice.*

The assignment of a judgment entered up before the Judgment Mortgage Act (13 & 14 Vict. c. 29) may be enrolled, and a writ of *elegit* may be issued on foot of such judgment.

Ex parte application on behalf of A. S. Foster and M. R. H. Foster, assignees of a judgment dated 3rd April, 1837, for leave to issue a writ of *elegit*.

The application was grounded on an affidavit of T. C. Franks, who deposed that judgment herein was entered against the defendant on the 3rd April, 1837, for the sum of £1000, and that the amount due on foot thereof was £1000, principal, and £2 3*s*. costs, making in all the sum of £1002 3*s*. It appeared from the affidavit that the defendant, who died many years ago, was, up to the time of his death, seized, possessed of, and entitled to certain lands, premises, and hereditaments; and that after divers assignments (particulars of which are set forth in the order hereunder) the plaintiffs' interest in the said judgment became vested in the said applicants, as assignees thereof, and interest, at the rate of £5 per cent. per annum, was regularly paid up to 16th February, 1894.

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(1) See note (2), p. 22, *supra*.

(2) Before Palles, C.B., and Murphy, J.

Jefferson, in support of the motion :—

Although a similar application was refused by the Queen's Bench Division in *Stannus* v. *Stannus* (1), there appears to be a precedent for this Division granting same: *Montgomery* v. *Atkinson* (2). Although the Statute Law Revision (Ir.) Act, 1878 (41 & 42 Vict. c. 57), repealed the statute 9 Geo. 2, c. 5 (Ir.), it did not take away or obliterate the remedy then existing on foot of judgments entered in 1837, one of which remedies was the issue of a writ of *elegit*. [Counsel also cited Gen. Order XLII., Rule 8, and Gen. Order XLIII. Rules 1 and 3; the R. S. C. (Aug., 1893, costs) items 226 & 227.]

THEIR LORDSHIPS granted the application.

The following is the curial part of the order :—

"IT is ordered by the Court that the said assignees, A. S. Foster and M. R. H. Foster, be at liberty to issue execution by way of writ of *elegit* on foot of the said judgment for the sum of £1000 principal, and £2 3*s*. (being the amount due on foot of the said judgment for principal and costs), with interest thereon from the 16th February, 1894, and also £5 5*s*., as and for the costs of this motion, the said amounts to be levied off such of the lands, tenements, and hereditaments whereof the defendant was, at the time of his death, seized, possessed of, or entitled to, and which are now subject to the said judgment, and liable to pay the amount now due thereon. And it is further ordered that the proper officer of this Division be at liberty to enter on the roll of the said judgment entered in this action as of Hilary Term, 1837, and No. 333 on the said roll, a memorandum of a memorial of the assignment of the said judgment, dated the 27th April, 1885, between W. Harrington of the one part, and Lucinda Harrington, W. B. Harrington, S. Harrington, and J. E. Harrington, of the other part, and of the assignment dated the 31st March, 1887, between the said Lucinda Harrington, W. B. Harrington, S. Harrington, and J. E. Harrington, of the one part, and the said S. Harrington of the other part, and the assign-

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(1) 28 Ir. L. T. R. 47.

(2) Unreported. 28th Nov., 1888.

Ex. Div.
1894.

LYONS
v.
KEARNEY.

ment dated the 27th February, 1894, between the said S. Harrington of the one part and the said A. S. Foster and M. R. H. Foster of the other part."

Solicitor for the assignees: *T. C. Franks.*

J. P. B.

ELIZABETH POWELL *v.* GEORGE ADAMSON AND RICHARD PILKINGTON (1).

(1890—F. No. 481.)

Q. B. Div.
1893.

Feb. 3, 4, 5, 11.

Appeal.
May 8, 9.
July 28.

Landlord and tenant—Assignment of lease—Notice in writing—Particulars of assignment—23 & 24 Vict. c. 154, s. 14—Two defendants sued as jointly liable—Effect of compromise releasing one.

The notice in writing of the particulars of an assignment of a lease required by section 14 of the 23 & 24 Vict. c. 154 must state the mode in which the assignment is carried out, the parties to the assignment, and the date of the assignment.

One of two defendants sued for rent jointly, but defending separately, at the trial consented to judgment for portion of the amount sued for:—

Held, that the right of the plaintiff to recover the balance of the amount from the other defendant was not thereby prejudiced.

MOTION for judgment, pursuant to leave reserved, against the defendant Adamson, and counter-motion.

The writ was issued on the 16th June, 1890, indorsed with a claim for £406 14*s.* 4*d.*, one and a-half year's rent from 1st May, 1888, to 1st November, 1889, due by defendants in respect of certain lands in King's County, held by the defendants as tenants of the plaintiff under lease for lives renewable for ever.

The material facts alleged upon the pleadings, and proved at the trial, were as follows:—

By lease, dated 12th April, 1779, plaintiff's predecessor demised said lands to Daniel Ashton, for lives renewable for ever, at the yearly rent of £271 2*s.* 11*d.* Said lease was ultimately renewed by Devaynes Smith, by indenture dated 12th September, 1839, to Gustavus Jones and Richard Adamson, their heirs and assigns, for lives still in being.

On the death of said Richard Adamson in 1860, his son, the

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(1) In the Queen's Bench Division, before JOHNSON, HOLMES, and GIBSON, JJ.

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defendant, George Adamson, entered into receipt of the rents of the under-tenants on the lands. The lessee's interest was charged with annuities in favour of the defendant Pilkington, the defendant George Adamson, and others. The profit rents not proving sufficient to discharge the annuities, the defendant Adamson thought it better to get rid of the lands by assigning them to the defendant George Pilkington, retaining his position as an annuitant.

By indenture, dated 12th April, 1888, the defendant George Adamson, and other necessary parties, conveyed said lands, subject to the annuities thereon, to the defendant George Pilkington, his heirs and assigns. For the terms of this deed, see the judgment of the Lord Chancellor, *infra*, p. 61.

By indenture, dated 29th April, 1889, the defendant George Pilkington, subject to reservations as to management and agency fees, conveyed said lands to L. Wiley, gentleman, his heirs and assigns.

On the 28th April, 1888, the defendant Adamson wrote as follows to the plaintiff :—

"DEAR MADAM,—As Mr. Pilkington, one of the owners of the Kilcomin Estate, held by lease from year to year, has taken up the entire management of the property, and to enable him to do so more effectually, I, as well as some of the other parties [concerned], have assigned over to him any interest I may have in the freehold. As Mr. Pilkington is very energetic, I expect he will be able to pay up your rent very soon. This assignment, however, does not make over the annuity that I may have out of the lands. Will you kindly acknowledge this letter as a notice that I have assigned any interest I may have in the freehold of the property to Mr. Pilkington, and oblige, yours, &c.,

"G. ADAMSON."

To this the plaintiff's solicitor replied on the 1st May, 1888 :—

"DEAR SIR,—Mrs. Powell has handed me yours of the 28th ultimo, which purports to be a notice of assignment of Kilcomin. On her behalf I must decline to accept such notice as being insufficient, inasmuch as the particulars of such assignment are conspicuous by their absence. I must also request payment of a year's headrent due Mrs. Powell this day. . . . If a substantial payment be not made I shall be obliged to take proceedings.—Yours, &c.,

"W. BRIDGE."

Subsequently to this letter writs were issued, in the names of both defendants as plaintiffs, against the sub-tenants on the lands.

On the 1st February, 1890, the plaintiff recovered possession of the said lands, under writ of possession in an action against the present defendants for non-payment of rent.

The defendants defended separately. Adamson, in his defence, pleaded that, before any of the rent now claimed became due, he had, by deed, assigned all his interest in said lands to the defendant Pilkington, who entered and was possessed of said lands, and that due notice of such assignment was given before the first gale of rent now claimed had commenced to accrue.

The plaintiff in her reply, as amended at the trial, averred that the said deed of assignment was sham, fraudulent, and colourable merely, and intended really to operate only as constituting the defendant Pilkington agent on behalf of the defendant Adamson.

The defendant Pilkington, in his defence, pleaded payment before action brought of £271 2*s.* 11*d.*, part of the amount claimed; and, as to the residue £135 11*s* 5*d.*, being the half-yearly gale which fell due on the 1st November, 1889, pleaded the assignment by him to Lewis Wiley, who entered and was possessed of said lands, and that due notice in writing of the parties to same was given before the said half-yearly gale commenced to accrue.

The plaintiff in her reply joined issue, and, as a further reply, averred that the assignment to Wiley was sham, fraudulent, and colourable merely, in that said Wiley was a fictitious person, and in any case never entered into, or was in possession of, the said demised premises or in receipt of the rents, and that, notwithstanding such assignment, the defendant Pilkington continued in possession and receipt of the rents; and, alternatively, averred that said assignment was sham and colourable merely, and really intended to operate only as constituting said Lewis Wiley, agent of the defendant, to collect the said defendant's share of the rents and profits.

The action was tried before Palles, C.B., with a common jury, on the 23rd February, 1892. At the commencement of the trial the plaintiff and the defendant Pilkington, through their counsel, entered into a consent that the said defendant should pay the plaintiff, on May 1, 1892, the sum of £50, together with a measured sum for costs to the plaintiff's solicitor, the sum of £50 to be "in full for all claim of the plaintiff against the said defendant in this action for rent." This consent having,

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by direction of the Lord Chief Baron, been made a rule of Court, the trial proceeded against the defendant Adamson. *Carson, Q.C.*, for the plaintiff, required the learned judge to tell the jury that the fact of Adamson having retained by the deed all the beneficial interest which he had prior to its date was evidence that the deed was not *bona fide.* The Chief Baron declined to accede to the requisition, but did not tell the jury anything to the contrary. *Carson, Q.C.*, required a direction on the following grounds:—1, that the notice was not sufficient within the Act of 1860; 2, that as Adamson retained a beneficial interest in the lands (*i.e.* his annuity) he was still liable. *Murray*, for the defendant, asked for a direction, on the ground that there was no evidence that the deed was not *bona fide.* The Chief Baron refused so to direct, and left to the jury the question: "Whether the conveyance of 12th April, 1888, was *bona fide*, and intended to pass the estate to Mr. Pilkington according to its terms." The jury answered the question in the affirmative. The Chief Baron abstained from giving judgment, leaving the parties to move for judgment as they might be advised.

George Wright, Q. C., Carson, Q.C., and *M. Longfield*, for the plaintiff.

Robertson, Q.C., and *John Murray*, for the defendant Adamson.

Cur. adv. vult.

Feb. 11.

JOHNSON, J.:—

This is an action for £406 14*s.* 4*d.*, one and a-half year's rent ending 1st November, 1889, brought by the plaintiff, as assignee of the reversion on a lease in perpetuity, against the two defendants, as assignees of the lessee's interest in the lease. The defendants appeared and defended separately. The material defence which Adamson relied on was that, before the commencement of the first gale of rent sued for, he had assigned by deed to Pilkington, and had given due notice to the plaintiff. Pilkington pleaded that he had assigned to another person, and had given due notice to the plaintiff. Reply was filed by the plaintiff, taking issue on these defences; and, in this state of the pleadings, the action came on for trial before the Chief Baron on the 23rd February, 1892. Plaintiff's counsel then at the trial applied for and obtained leave to file two further replications; as to Adamson, that his alleged assignment to Pilkington was not *bona fide*, or intended to pass the estate; and, as to Pilkington, that his assignment to another person was a sham. These replications were accordingly filed, and the plaintiff then settled with Pilkington all claim for the rent by the consent (made a rule of Court), on the effect of which so much argument has been addressed to us; and the trial proceeded against Adamson on the two matters in controversy on the pleadings as they then stood between him and the plaintiff:—viz. 1, Was his assignment to Pilkington *bona fide* and intended to pass the estate? (which the jury found in the affirmative, and this finding is not questioned); 2, Was the notice of such assignment to the plaintiff a sufficient or valid notice under the Landlord and Tenant Act, 1860, sect. 14. No further alteration was made in the pleadings in consequence of the altered state of the case against Adamson, by reason of the plaintiff's settlement with Pilkington by the consent in the action. The plaintiff's counsel called on the learned Chief Baron to direct that Adamson's notice was not sufficient under the Act of 1860, but the Chief Baron declined to do so and left each party to move. Accordingly the plaintiff moves to enter judgment against Adamson for the whole rent sued for, and Adamson moves to enter judgment for him. The case has been argued at some length, and we are called on to draw all legitimate inferences of fact, and finally to determine all the matters in dispute on the materials before us under Order XL. Rule 9. It would however have been more regular and satisfactory if the points which have been argued before us had been raised in some formal manner, either by amendment of the pleadings, or by being stated as grounds in Adamson's notice of motion for judgment.

The first question which was argued here is: Did the notice by Adamson to the plaintiff of his assignment to Pilkington comply with the requirements of the Landlord and Tenant Act, 1860, sect. 14, so as to discharge Adamson from liability to the plaintiff? Before that Act the liability of an assignee of a leasehold holding, as between himself and the lessor or other reversioner on the lease, arose from possession and privity of estate, and this liability such assignee could always defeat by assigning over, even to a pauper, without any notice to the landlord. A person in lawful possession of the holding from the lessee or assignee was *prima facie* presumed to be assignee; but when the landlord came to sue him as assignee he was frequently defeated by proof that the defendant was not assignee but was in possession under some other estate or interest. This was the state of things which the Act of 1860 was in this respect intended to remedy. By sect. 9, it is provided that a tenant's interest under any lease or contract of tenancy shall be assigned by deed, or instrument in writing, devise, bequest, or act and operation of law, and not otherwise. Having so provided for the mode of assignment, by sect. 14 it is provided that no assignment by any assignee of the tenant's interest "shall discharge such assignee from his liability to the landlord unless and until notice in writing of the particulars of such assignment shall have been given to the landlord. By sect. 15, it is provided that, if the assignment is between two gale-days, the assignee shall remain liable to the landlord for the rent, and on the covenants and agreements in the lease or contract of tenancy, up to and including the gale-day ensuing the assignment." This is an advantage for the landlord, plainly and clearly enacted, which in the previous state of the law the landlord did not enjoy.

An assignment, therefore, must be made by some one or other of the means prescribed by sect. 9, and not otherwise, and then notice in writing of the particulars of such assignment so made must be given to the landlord. Unless and until that is done pursuant to the statute, the person so assigning remains, by the statutory obligation, liable to the landlord as before. In the present case it was proved that the assignment was by deed, 12th April, 1888. The jury have found this deed to be *bona fide*, and it is an absolute assignment to Pilkington. The letter relied on for Adamson as notice of "the particulars of such assignment" to discharge him from liability is this:—[His Lordship read the letter of the 28th April, 1888, and continued:—] No technicality in any form of notice is necessary; but it is not stated in this letter, nor does it thereby appear, in what manner, whether by any or what instrument, Adamson had assigned, and therefore it is not notice in writing "of the particulars of such assignment," there being nothing in the notice to show what "such assignment" was, of which the particulars ought to have been given by notice in writing. I therefore think that Adamson, by virtue of the statute, remained liable to the plaintiff for want of a notice pursuant to the Act of 1860, sect. 14.

If this be so, the next question is, what was Pilkington's position as regards the landlord? It was argued that sect. 14, is susceptible of the construction that, although Adamson remained liable to the landlord by virtue of the statutory obligation, yet that Pilkington was also at the same time liable to the landlord by virtue of possession and privity of estate: but it appears to me, that the scope and object of sect. 14 was to secure to the landlord clear evidence, on which he could act, of the nature and particulars of the assignment; that, until that was done, the assignee should continue liable to the landlord as his tenant as theretofore. It is not, I think, a necessary or reasonable construction of the statute (sect. 14) that it should be held to confer upon the landlord a double remedy which he never had in the previously existing state of the law, viz. that the landlord should thus have at one and the same moment, two several assignees, each liable to the landlord for the same rent. The one, Adamson, by statutory obligation, by virtue of the notice of assignment being invalid, and the other, Pilkington, by virtue of possession or privity of estate. If, when it turned out that Adamson and Pilkington were not joint assignees, the landlord (the notice being invalid) had recovered against Adamson on his statutory obligation, then Adamson, by virtue of his assignment to Pilkington, would have been entitled to be indemnified to that extent by Pilkington. As Pilkington, therefore, was the person on whom the liability would ultimately fall, it was Pilkington's interest to settle for the rent with the landlord (if possible) on the best and easiest terms; and by entering into the consent, the landlord appears to me to have taken and dealt with Pilkington as assignee and tenant, and to have settled the arrear of rent with him on that basis and thus to have precluded or estopped herself from relying on any invalidity of the notice, and therefore from relying on Adamson's statutory obligation to her, or recovering against Adamson, in the altered state of the case, after the consent between the plaintiff and Pilkington in the action was made a rule of Court.

For these reasons I think that judgment should be entered for

Adamson in the action, with costs. But, as this point was not, so far as I can see, taken at the trial, and was first suggested early in the argument by the Court, I think there should be no costs of this argument.

Holmes, J.:—

With considerable hesitation, and not without a lingering doubt, I have come to the conclusion that the notice of assignment given by Adamson was sufficient.

Before the year 1860 the assignee of leasehold premises was entitled to relieve himself from liability for the rent reserved by the lease by assigning his interest. If it could be shown that he retained possession, or continued in enjoyment of the profits after the assignment, and that the transfer was only colourable, the transaction might be impeached as fraudulent; but, if the assignee really parted with his estate, his motive in doing so was immaterial. He might have assigned to a pauper, or to a prisoner in confinement for debt; and it was not necessary that his assignee should enter into possession, or indicate by word or act that he had accepted the assignment. This branch of the law of landlord and tenant was not substantially altered by Deasy's Act; but two modifications were made in it in the interest of the landlord. It was provided that the tenant should no longer be discharged by assignment merely. He was to continue liable, until notice in writing of the particulars of the assignment had been given to the landlord; and he was only entitled to be relieved from his obligations from and after the gale-day next following the service of such notice. It is upon these provisions that the first question argued in this case depends. Before the rent sued for became due, Adamson, himself an assignee, assigned his interest in the leasehold premises to Pilkington, and wrote a letter to the plaintiff, which he relies upon as a notice of the particulars of the assignment. There is no doubt, from the final sentence of the letter, that it was intended by the writer to be notice under the statute. It is equally clear from the reply of the plaintiff that she knew that it was so intended. It is for the Court to decide whether what is contained in this document amounts to "particulars" of the assignment, within the meaning to be given to these words in the 14th section of the

Act. This question, as far as I am aware, has not been discussed on any former occasion; and decisions under other statutes afford no assistance. There is no rule of general application by which the sufficiency of "particulars" can be determined. What ought to be specified in them depends upon the matter to which they relate, and what would be ample for one purpose might be inadequate for another. I therefore propose to consider the contents of the notice in two points of view—1, in reference to the subject with which the particulars mentioned in the section are to deal, and, 2, in reference to the object for which they are prescribed.

There are, I believe, only three ways in which leasehold premises can be legally assigned, by instrument in writing *inter vivos*, by will, or by act and operation of law. The notice ought, in my opinion, to show in which of these modes the assignment has been effected. This, at least, is included in the term "particulars"; and, if the document relied on by the defendant fails in this, it fails altogether. After some consideration, I have come to the conclusion that it appears in it with sufficient clearness that the writer had assigned by instrument *inter vivos*. Where premises pass from one person to another by operation of law, the former cannot say with either legal or literary propriety that he had assigned them; and a testator after making his will would not speak of having assigned the property which would pass under it at his death, if it was then unrevoked. Both lawyer and layman understand by the statement that a tenant has assigned his interest under a lease that he has transferred his estate in the lands by a document having immediate operation; and such is the natural interpretation of the defendant's letter. It was suggested during the argument that a man who had done nothing more than put another into possession of the premises, or who had tried to make a gift of them by word of mouth, might state that he had assigned them; No doubt, he might; and he might also serve a notice giving elaborate particulars of a deed of assignment that existed only in his own imagination. In both cases the notice would be bad; but this would arise from the untruthfulness, and not from the insufficiency of the particulars.

Having thus satisfied myself that it appears from the notice

BIBL. [illegible] UNIV.

that the alleged assignment was carried out by an instrument in writing *inter vivos*, I proceed to inquire whether the notice describes it in such a way as to satisfy the statute. What is required in such an instrument? "I, George Adamson, hereby assign to Richard Pilkington my interest in the lands of which I am tenant, under lease, to Elizabeth Powell." If a document in these words were signed, or sealed and delivered, by Adamson, it would contain everything that is wanted to constitute a valid assignment of his estate in the premises. It is not necessary to state either date or consideration. The execution need not be witnessed. The name of the assignor, the name of the assignee, a description of the lands sufficient for their identification, and words indicating that the assignor assigns his interest in the lands to the assignee, are all that is required; and all these matters are contained in the defendant's letter. No doubt an instrument of assignment is as a general rule not confined within these narrow limits. It is dated, sets forth the consideration, contains covenants on the part of assignor and assignee, and occasionally includes other matters, unconnected, or very distantly connected, with the actual transfer of the property. Is it necessary that the notice prescribed by the 14th section should give an abstract of everything to be found in the document? I think not. It is particulars of the assignment, not of the deed or instrument by which the assignment is carried out, that are to be given. Date, consideration, covenants, declaration of trusts, may be very important for certain purposes, but they are not essential to, and they form no part of, the transfer of the interest, and therefore need not be specified in the notice, if the particulars to be contained therein are to be ascertained solely by reference to the subject to which they relate. There is, however, one thing essential to an assignment by instrument *inter vivos*, which is not specifically mentioned in Adamson's letter—that is, execution by signature, or by sealing and delivery. I am, however, of opinion that this is necessarily included in the statement that he had assigned. This implies that the assignment was duly executed; and it is immaterial whether it was carried out by deed delivered, or writing signed. If the letter had stated that Adamson had assigned his interest by instrument in writing, and there had followed a statement of its date and of the parties, with a perfect abstract of its contents, could it be held that this was an insufficient notice upon the ground that it did not specifically aver that the document had been either signed, or sealed and delivered, by the grantor? If such an objection was raised there would be the ready answer that this would only be a repetition of what had already sufficiently appeared. Although the notice in this case is of a much less formal character, a similar objection to it can be similarly met.

For these reasons, I am of opinion that the particulars are sufficient, if they are tested by reference to what constitutes an assignment. I proceed to test them by reference to the object of the Legislature in prescribing the service of the notice. I have already pointed out that Deasy's Act has left the former law on this subject substantially unchanged. It still permits an assignee to escape future liability by substituting for himself an insolvent as tenant. No additional conditions as regards the assignment itself are introduced. It is still as difficult as of old for the landlord to obtain relief from the consequences of this assignment on the grounds of fraud. Therefore, it is not in connexion with any of these matters that the service of the notice has been required. There was only one mischief existing before the statute, for which the provision as to the notice would afford a remedy, and which, I therefore infer, it was intended to remedy. Under the former law, a landlord might have sued for rent a person who had been for years his tenant; he might have neither known of nor suspected a transfer of the interest; the tenant was not bound to answer any questions on the subject; and, if the premises were in the occupation of under-tenants there would be nothing to indicate a change of ownership; and yet the landlord would have been defeated in the action, and involved in considerable expense by the fact, disclosed for the first time in the pleadings, that the defendant's interest had been assigned.

The provision requiring notice to be given is an effectual remedy for this mischief; but, as far I can see, it could confer no other benefit on the landlord, no matter how full and complete were the particulars given. No doubt, in addition to being a warning that the previous tenant is no longer liable, it is an intimation that another person has taken his place. But, for both the fact of the assignment and the name of the assignee, the lessor is obliged to depend (at least as far as the provision of the statute gives him protection) upon the statement contained in the notice. The alleged assignee may deny the assignment; and the landlord sues him at the risk of having been misled by the person from whom the notice came. If the Legislature had thought it desirable that the landlord should know with certainty that there had been an actual assignment, it could have imposed the necessity of registration in the office for the registry of deeds, or have required the document to be executed in the presence of witnesses from whom inquiries might have been made. But it has not done this. The landlord merely receives a statement which is unverified and which it may be impossible for him to verify. Under these circumstances it seems to me that the object of the notice, in so far as such object can be ascertained from comparing the statute with the previous law, is amply satisfied if the particulars are confined to the essential parts of the instrument of transfer, that is to say, to a statement of the names of the assignor and assignee, and that the former has assigned to the latter certain premises, described in such a way as to ensure their identification.

It may, however, be said that I have omitted in this enumeration of particulars one matter, which, although not essential to the validity of the instrument, might be needed to carry out what I conceive to have been the object of the Legislature. By the old law, the assigning tenant was relieved from obligations accruing after the date of the assignment; and it may be argued that, if this date is not given in the notice, the landlord might still be led to sue him for rent that had become due before the notice, but which, upon the production of the document, would be found to have accrued after its execution. This objection is met by the 15th section, which provides that the liability of the tenant is to continue up to and including the gale-day next following the service of the notice. For this reason, I am of opinion that, whether we look to the essentials of an assignment, or to the object of the enactment, the date is immaterial.

I therefore sum up by saying that we have in this case a document served by the defendant Adamson on the plaintiff, and showing upon its face that it purported to be the prescribed notice of assignment. It is stated in that document that Adamson had assigned to Pilkington all his interest in the leasehold premises. It is not denied that the premises are described in it with a particularity sufficient for their identification, and that the alleged assignee (whose christian name and surname, with an intervening initial, are given) was known to the plaintiff. The instrument of transfer when produced corresponds with the particulars thus given. I therefore hold that Adamson is not liable for the rent sued for, and that he is entitled to judgment against the plaintiff. Under these circumstances, it is unnecessary for me to consider the other interesting questions that have been discussed during this argument.

Gibson, J. :—

On the facts and finding of the jury in this case, the liability of the defendants Adamson and Pilkington are several, and not joint. Two questions have been mainly argued before us on behalf of Adamson—first, whether the notice of April, 1888, was sufficient under the 14th section of Deasy's Act; secondly, whether, if the notice was insufficient, the consent entered into between the plaintiff and the defendant Pilkington at the trial constitutes an answer to the plaintiff's application for judgment.

The first point involves the true interpretation of the proviso in the 14th section, which was an alteration of the existing law, as to which there is no authority. The following points are clear: the notice which is spoken of is not notice of assignment as a matter of fact, but notice of the particulars of a written instrument; the assignment contemplated by the proviso is *inter vivos*, by act of party as distinct from act of law; and such assignment to be valid must be in writing; apart from equitable considerations of waiver, oral notice would be insufficient; and the sufficiency of the written notice is a matter of law depending on the construction of the section, irrespective of knowledge that the parties may possess *aliunde*.

What is the meaning of the expression "the particulars of such assignment?" What the section requires is not notice of the fact of assignment, but notice of particulars of a written instrument, and notice not merely of particulars, but notice of "the particulars." Does this mean some of the particulars? or all the substantial particulars? There is no doubt that a gift of "the" furniture in a house would carry all the furniture in such a house, and the addition of the word "all" would add nothing to the sense.

In my opinion (apart from questions of waiver) the particulars of the assignment must be the substantial particulars of the written instrument, and enable it to be identified, so as, on the one hand, to prevent evasion and fraud, and on the other hand to enable the landlord to know against whom he can go, and the date when the liability of the assignee accrued. The construction contended for by the defendant strikes out the words "the particulars" or gives them no independent force, and makes the proviso have the same meaning as if the language was "until notice of assignment" merely. I have looked through some statutes prescribing written notice, or written forms, but they do not perhaps throw much light on the present controversy. The Judicature Act, sect. 28, sub-sect. (6), speaks of assignments of which express notice in writing is given. There is no decision as to the sufficiency in form of a notice under this provision; but so far as I know, the notices in the reported cases have given full particulars. The statute of 1867, with regard to the assignment of policies of assurance requires notice of the date and purport of the assignment. The only argument which can be founded on this is that Parliament considered the date might be material, and did not pay attention to the difficulties suggested in argument by defendant's counsel, such as the difficulty of specifying the date where there were several assignors executing at different times, or where the date of delivery of the deed did not correspond with the written date. The statutes relating to notice of action do not in terms prescribe any date, but in practice such date of the cause of action is always given, and in Roscoe it is stated that the date is essential. The Registry Act, s. 7, expressly requires the date of the instrument to be stated in the memorial. The statute 4 Anne, c. 16, s. 10, protects a tenant paying rent to a landlord grantor "before notice shall be given to him (the tenant) of such grant by the grantee." The contrast between the language of this section and the 14th section is obvious. The former only requires an oral notice of the fact of grant and no particulars of the instrument are required.

Next. Is the notice here sufficient? The sufficiency of the statutory notice cannot depend on the knowledge of either of the parties. The matter is a pure question of construction of the statute on the one side, and of the written notice on the other. The possible points on which the letter, which was certainly intended by the defendant to be a compliance with the statute, may be challenged appear to me to be these. 1, The notice gives no date; 2, it does not name the parties; 3, it does not specify the mode of assignment. Are these omissions, or any of them, fatal? First, as to the date, no doubt a date is not essential to the validity of an assignment, but where an assignment is dated, the date appears to be a material particular, and to come within "the particulars of such assignment" prescribed by the statute. Under the Registry Act, a deed need not be dated, but if it is, the memorial must give the date. The point is not, whether a notice might not, in theory, be reasonably sufficient without giving the date, but what the statute on its true construction requires. Some might think the date useless. To me it would occur that the mention of the date would be material as tending to prevent fraud, and informing the landlord as to the commencement of the assignee's liability, it being of course obvious that such liability exists by virtue of the assignment apart from the notice. Whether the notice be given or no, the estate passes by the assignment, and carries with it liability to rent and covenants from the date of assignment.

Secondly, as to the parties: the letter conveys that there were other persons who were joint owners, some of whom had joined with Adamson in assigning, and others had not; as a matter of fact one of the parties to the deed did not execute till the following year. It was argued that it was enough if Adamson the defendant showed by the notice that he at least had assigned. I doubt this. Suppose that there were two joint owners of a lease, and they jointly assigned by deed to a purchaser. Would a notice stating assignment by one be a compliance with the statute? Do not the particulars of the assignment import the names of the parties, a most essential matter, to preclude fabrication and deceit?

Thirdly, the notice does not specify the mode of assignment. Sometimes a transfer is made without writing, or by writing in the nature of an executory contract not passing any legal estate; and such transfer, followed by possession under it, is effectual in equity, and would in popular language be described as an assignment. The letter does not state that the assignment is in writing, or, if in writing, whether it is by deed, or some other mode of assignment, information material for the landlord to possess and seeming to fall within "the particulars" directed by the section. I should hesitate to decide on this ground alone, but, altogether, looking at the letter as a whole, I think it cannot be construed as a sufficient notice of the particulars of such assignment.

Another question, arising on the construction of the section, put to defendant's counsel by the Court, but not argued by them, requires some notice. At Common Law the assignee of a lease was not liable after assignment over. Section 14 of Deasy's Act does not postpone the operation of the assignment until the notice is given. Even if no notice is given, the new assignee becomes liable on the lease becoming vested in him by reason of privity of estate. The question is, can a landlord enforce payment of rent by the new assignee, thereby adopting the assignment, and at the same time hold the assignor liable because he has not served a written notice? Can the landlord get judgment against the assignor and assignee severally for the same rent? I think he can certainly do so, if he first sues the assignor. Judgment against the assignor without satisfaction could not be a defence to the assignee. Does the same principle apply where the judgment is against the assignee in the first instance? or can the assignor set up such unsatisfied judgment against the assignee as a defence, notwithstanding that he has served no notice? Under the 15th section, it is clear there can be two judgments. On the whole, I think it best to adhere to the literal meaning of section 14, that the liability of the assignor is prolonged in every case until the statutory notice is given. This would put him very much in the position of a lessee, but he can get rid of liability by serving the prescribed notice. This question would hardly arise in practice, as there would be evidence of waiver from acceptance of rent and adoption of the new assignee.

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In this action it is doubtful whether the question above suggested absolutely requires decision. The action was brought against the defendants jointly, and the consent entered into with Pilkington was on that footing, and not on the basis that he was assignee from Adamson; the plaintiff at the very time disputing the validity of such assignment. It would seem strange that a landlord, suing both the assignor and assignee in the same action as either jointly or severally liable, should not be able to make a settlement with one without discharging the other. If the consent had been with Adamson, it would not have released Pilkington. No judgment has apparently been yet marked. This point was not put at the trial, and it was not argued at the Bar. I cannot say that I have not considerable doubt as to the correctness of the opinion I have formed.

Assuming that the notice is insufficient, and that the construction of the statute is adverse to the defendant, we have next to consider whether the defendant can rely upon the consent entered into with Pilkington as in any way disentitling the plaintiff to judgment against Adamson. First, it was put that no point of this kind was raised at the trial. This was so, and, in my opinion, if the matter in anyway could have involved a jury question, the defendant could not now rely upon it. But, if the consent order is of such a kind as to make it inequitable *per se* to give judgment against Adamson, and complete and final justice can now be done, he is at liberty to protect himself thereby. The remedy by *audita querela* is abolished, and the Court ought not to give a wrong judgment. A strong illustration of this is supplied by *Hughes' Case* (1) where, even after judgment, relief was given.

It was then ingeniously suggested by Mr. Longfield that there could be no right of indemnity by Adamson against Pilkington, because the liability of the former to the landlord resulted solely from his own omission to give the statutory notice. But Pilkington himself could have served this notice; he got the whole benefit of the assignment, and the case falls within the principle stated by Willes, J., in *Moule* v. *Garrett* (2).

Assuming that Adamson has a right of indemnity as against

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(1) 2 App. Cas. 439.

(2) L. R. 7 Ex. 101.

Pilkington, are they principal and surety so far as regards the plaintiff? The case of *Baynton* v. *Morgan* (1) in the Court of Appeal is a direct authority that a lessee (so far as regards the lessor) is not surety for an assignee. They are each severally principals. If the lessee was surety, the decision of *Baynton* v. *Morgan* (1) would seem irreconcileable with *Holme* v. *Bruskill* (2). The judgment of Fry, L. J., is very strong on the point (see especially p. 81). But, though *qua* the landlord they may not be principal and surety, if *Baynton* v. *Morgan* (1) be well decided, I am of opinion that the plaintiff is not entitled to disregard the rights and duties which flow from the obligation to indemnify. It would seem inequitable for the plaintiff, releasing Pilkington, to be at liberty to proceed against Adamson for the full amount; the latter being in turn entitled to be indemnified by Pilkington, who would thus find his release nullified. The analogy of acceptor and drawer, both liable to the indorsee as principals, but *inter se* primarily and secondarily liable, and the judgment by Lord Selborne in *Duncan Fox & Co.* v. *North and South Wales Bank* (3) support this view. It is strange that this argument and this case were not relied upon in *Baynton* v. *Morgan* (1).

In my opinion the plaintiff cannot, after releasing Pilkington from the debt save as to £50, go against Adamson for any greater amount than £50. Can he recover even this £50? It is said he cannot, because the release prejudices Adamson, and no remedies were reserved. But so far as the £50, there is no release: *Provincial Bank* v. *Cussen* (4); and the reduction of Pilkington's liability is a benefit to Adamson himself. It is then suggested that time was given, because judgment was not to be marked for a week. This point is susceptible of several answers. It could have been pleaded by leave; if pleaded, and the objection made, it might be that an inference of reservation of right might have been drawn: *Ex parte Good* (5). The defendant cannot be allowed to make a point now for the first time which could have been dealt with at the trial. Again, the action was against the defendants as joint lessees, and the plaintiff, while compromising with

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(1) 22 Q. B. Div. 74.
(2) 3 Q. B. Div. 495.
(3) 16 App. Cas. 11.
(4) 18 L. R. Ir. 382.
(5) 5 Ch. Div. 59.

Pilkington, was proceeding against Adamson, whose assignment she impeached as fraudulent. I am not aware of any case where a short stay of execution given at the trial, under such circumstances, where there could be no real prejudice, has been held to come within the equitable doctrine of giving of time. The plaintiff's costs could not have been taxed in the few days given. The final reason for declining to regard the stay as ground of release is the explicit opinion of Sir Edward Fry in *Baynton* v. *Morgan* (1), that giving of time to an assignee does not extinguish the lessee's liability on his covenant. See also *Swire* v. *Redman* (2).

In my opinion the plaintiff is entitled to judgment against the defendant Adamson for the sum of £50, the same sum as secured by Pilkington's consent.

A. E. R. J.

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July 28.

The plaintiff appealed to the Court of Appeal (3).

Wright, *Q.C.*, *F. Fleming*, and *M. Longfield*, for the appellant.

Robertson, *Q.C.*, and *John Murray*, for the defendant Adamson.

Cur adv. vult.

WALKER, C. :—

In this case the action was instituted against Adamson and Pilkington for a sum of £406 14*s.* 4*d.* arrears of rent. The statement of claim sets out the original lease, dated the 12th April, 1779, from William Smith to Daniel Ashton for lives renewable for ever, and a renewal dated the 12th September, 1839, made by Devaynes Smyth to Gustavus Jones and Richard Adamson, and avers that the lessor's interest became vested in the plaintiff, and the lessee's interests in the defendants. The defendants separated in their defences. Adamson, after traversing the averments contained in plaintiff's claim, pleaded that before accrual of any of the rent claimed, he had assigned by deed all his interest to the

(1) 22 Q. B. Div. 74.
(2) 1 Q. B. Div. 536.
(3) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

defendant Pilkington, and that he had given due notice of this assignment within the statute before the first gale of rent claimed had accrued. Pilkington put in similar traverses, and pleaded payment before action brought of £271 2*s.* 11*d.*, and as to the balance, £135 11*s.* 5*d.*, pleaded that by deed dated the 29th April, 1889, he had assigned all his interest to Lewis Wiley, and had given due notice of the said assignment. Plaintiff replied as to Pilkington's defence, that the deed of April 29, 1889, was a sham and colourable deed, and that the alleged assignee, Lewis Wiley, was a fictitious person, that in any case he did not enter into possession; but the defendant Pilkington continued, and continues, in possession. The reply also alleged that the deed was not intended to operate as an assignment, but was only an agency transaction to enable Lewis Wiley to collect Pilkington's share of the rents as his agent, and that Wiley had acted under the deed merely as such agent, and not otherwise. At the trial counsel for the plaintiff obtained leave to file an additional reply that the deed of assignment, whereby Adamson purported to assign his interest to Pilkington, was sham and fraudulent.

At the trial before the Lord Chief Baron the plaintiff proved the several leases, and it was admitted that the tenant's interest had vested in Adamson.

There were also proved various proceedings by Adamson and Pilkington against sub-tenants on the lands, both in the superior and County Court, and in numerous instances the rent to the 1st November, 1889, was claimed in those proceedings by Adamson and Pilkington. The proceedings in an action against Adamson for the rent ending 1st May, 1888, were also proved, which rent was paid, and there were also proved the proceedings in an ejectment for rent against Pilkington and Adamson, dated the 7th October, 1889, in which judgment was obtained. Possession was delivered on the 1st February, 1890.

The main defence of the defendant Adamson was that before any of the rent claimed accrued he had by deed, purporting to bear date the 12th April, 1888, assigned away all his interest to Pilkington, and had given due notice of it by letter dated the 28th April, 1888. The deed was proved, for the jury found it was *bona fide,* and intended to pass the estate to Pilkington according to its terms.

In the Court below the learned Judges differed in opinion; but, in result, though for different reasons, there was a conclusion in favour of defendants. The first question is whether there was a sufficient notice given by Adamson as assignee to exempt him from further liability within the meaning of section 14 of the Act of 1860.

At common law an assignee of a lease was only liable for rent accrued in his own time, and he could defeat the landlord's claim by assigning over, before the rent claimed accrued, and no notice of assignment to the landlord was necessary. The legislation under the Landlord and Tenant Act of 1860 is this:—By sect. 9, an assignment must be made by deed or instrument in writing, signed by the party assigning or granting or his agent thereto lawfully authorized in writing, or by devise, bequest, or act and operation of law, and not otherwise: and by section 14 it is provided that "no landlord or tenant, being such by assignment, devise, bequest, or act and operation of law only, shall have the benefit or be liable in respect of the breach of any covenant or contract contained or implied in the lease or other contract of tenancy, otherwise than in respect of such rent as shall have accrued due, and such breaches as shall have occurred or continued subsequent to such assignment, and whilst he shall have continued to be such assignee": that is merely a declaration of the common law. Then follows the proviso that "no assignment made by any assignee of the estate or interest of any tenant shall discharge such assignee from his liability to the landlord, unless and until notice in writing of the particulars of such assignment shall have been given to the landlord." And by section 15 every assignee assigning between two gale-days remains liable, notwithstanding the assignment, to the payment of the rent and performance of the covenants "up to and including the gale-day next following the service of notice of the assignment."

To test the application of section 14 let us see the deed, which was afterwards proved at the trial, as it stood on the 12th April, 1888. It purports to be made between George Archibald Graham Adamson of the first part; Henry Graham Adamson, described as eldest son of the said George Archibald Graham Adamson, by his first marriage, of the second part; George Percival Adamson,

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described as eldest son of the said George Archibald Graham Adamson, by his second marriage, and Richard Grant Pilkington of the fourth part. It recites that the party thereto of the first part was tenant for life, subject to certain annuities of the premises thereinafter assigned, and that the parties of the second and third parts were owners of the reversion expectant on his death. It then proceeds to assign all that and those the lands in question to hold to the use of the party of the fourth part.

It appears from the deed produced that as regards one of these parties, George Percival Adamson, it was only executed in the year following, and that it was never executed by Henry Graham Adamson. That is the deed: let us now see the letter, dated the 28th April, 1888, which it is contended constitutes the notice of assignment. It is as follows:—[His Lordship read the letter and continued.]

The words "one of the owners" are remarkable, and must be read in connection with the statement as to joint ownership in plaintiff's claim.

The solicitor for the plaintiff did not acknowledge this letter until the 1st May, when he at once raised the point that there was no sufficient compliance with the section of the statute, and that he must decline to accept it as notice, inasmuch as "the particulars of the assignment" were conspicuous by their absence. This letter does state that parties, of whom Mr. Adamson was one, had assigned the lands to Pilkington. It does not say how? or when? or by whom? The legislation under the Act, 1860, makes material the mode and the period at which it became operative, and I read sect. 14 as requiring not only notice that an assignment has been made, but also notice as to what are the particulars of that assignment in addition. I do not think it is sufficient merely to name the assignee; I think the particulars are wanting in, 1, the mode; 2, the parties; 3, the date, which are all material, having regard to ss. 9, 14, and 15, and are the very matters one would expect to be supplied under a notice for particulars.

But, further, I think the letter of the 28th April, 1888, designedly left vague the notice, and left the agent and the landlord uninformed; for the deed was not in fact signed by one party till September, and the date therefore was purposely omitted, as

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well as particulars of the nature of the interest of Adamson, which is stated to be "any interest I may have."

I think, so far as the form of the notice was concerned, the plaintiff was entitled to judgment against Adamson for the whole rent claimed, if nothing more had occurred; and there was evidence to go to the jury that he should get such judgment against both Adamson and Pilkington, as joint owners. The letter of 28th April, 1888, names Pilkington as one of the owners.

The next question in the case arises in this way: On the morning of the trial, before the case against the defendants was entered upon, Pilkington and the plaintiff entered into a consent, by which it was provided that by a fixed day the defendant Pilkington should pay to the plaintiff the sum of £50, in full, for all claim of the plaintiff against the said defendant in this action for rent, and that, in default of such payment by such day, judgment should be entered against Pilkington for the sum of £50. This consent was made a rule of Court, and the action against Adamson proceeded.

The result of the settlement with Pilkington has been differently viewed by the learned Judges in the Court below. Johnson, J., treated it as an estoppel, as a dealing with Pilkington, as assignee and tenant, and therefore as a bar to any claim against Adamson. It did not arise for consideration by Holmes, J., at all, having regard to the view he took of the notice. Gibson, J., in his judgment enters fully into the question, and I accept much of his reasoning, though I cannot his ultimate conclusion.

If the case had proceeded to trial there was certainly strong *prima facie* evidence that Adamson and Pilkington were jointly liable. In result, as the case developed, the issues involved became—1, the validity of the notice of assignment, and 2, the *bona fides* of the deed of 12th April, 1888. No doubt there were questions between Adamson and Pilkington *inter se* as to right of indemnity; but as regards the plaintiff, each was a principal. I cannot see how the relation of principal and surety as regards Mrs. Powell entered into the case; the point on the effect of the compromise with Pilkington was not made at the trial, and could not well be, for it arose contingently, and when the settlement with Pilkington was made. It was not present to the mind of plaintiff that she was doing anything but getting a payment on account of

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a joint liability, leaving the trial free as regards herself and Adamson; and I think, as the notice of Adamson was insufficient, his liability remains, but less by the credit of £50 taken from Pilkington. The case of *Watters* v. *Smith* (1), cited, is a useful authority on this branch of the case. In the result, I think the plaintiff is entitled to judgment for the balance of her claim and her costs, including the costs of this appeal.

FITZ GIBBON, L. J.:—

The elaborate judgments delivered in the Queen's Bench have necessitated a great deal of discussion and consideration here, but our difficulty in dealing with them is increased by the circumstance that, though two of those judgments resulted in a decision for the defendant, they rested on inconsistent grounds, while the third reached a very modified conclusion in favour of the plaintiff. Were it not for this difference of opinion, the case would not seem to me to be very difficult or complicated.

When the action began, the plaintiff unquestionably had due to her, from somebody, three gales of rent, under a demise; she was assignee of the lessor, and she was entitled to recover her rent from anybody whom she could show to be liable as assignee of the lessee. For this rent she sued two persons jointly. By her pleading she sued them as joint assignees, and if the case had been tried out, she could only get a verdict against both on evidence of joint liability. If she could show that one defendant was sole assignee, she would be entitled to a verdict and judgment against him for the amount due, though she would have to submit to a judgment in favour of the other defendant.

Down to the time of the trial, she was in a position to produce evidence which, if not contradicted, would have been sufficient to sustain the case of joint liability put forward in her pleading. Not only does the document relied on as the notice of assignment by Adamson indicate that the lessee's interest was the joint property of several people of whom the defendants were two, but there is evidence of proceedings taken against sub-tenants, and other dealings with the property by both defendants, quite sufficient to go to a jury upon the question of their joint liability.

In this state of things, when the case was actually called on for trial, one of the two defendants proceeded to make terms for himself; that he did so independently is clear from all the circumstances; separate counsel for the defendant Pilkington entered into distinct negotiations on his behalf with the counsel for the plaintiff; the counsel for the defendant Adamson ostentatiously kept aloof; a separate consent was entered into that Pilkington should be let out of his liability, whatever it was, for £50, to be paid by him to the plaintiff, and an explicit settlement was arrived at, which was no more nor less than this, that one of two defendants jointly sued but defending separately, both being in a position of possible liability, made the best terms he could for himself alone, without regard to the rights or liabilities of his co-defendant. The plaintiff was entitled to go on against the other defendant; but the Chief Baron rightly required that the settlement with Pilkington should first be made a rule of Court. That was, as it appears to me, an eminently just course; for, whether it relieved Adamson or not, the settlement with Pilkington should be definitely made before the action was permitted to proceed. When it did proceed, the plaintiff's case of joint liability went by the board, for the sole title was shown to be in Adamson until he assigned all his interest to Pilkington. If notice of the assignment had been validly given, Adamson would have been entitled to a verdict. If, on the other hand, the alleged assignment was a sham, or failed, Adamson alone must have remained liable for the entire amount, and Pilkington would have been entitled to a verdict, unless his having settled the claim against him made a difference in favour of Adamson. Whether Pilkington's payment of £50 to get himself out of the action can give Adamson a new defence is a separate question.

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(1) 2 B. & Ad. 889.

Let us first see what was Adamson's position, irrespective of Pilkington's compromise. The question of fact raised at the trial was that of the reality of the assignment, and has been found in favour of Adamson. There remained the question of the sufficiency of the notice of the assignment. These were the only questions debated at the trial after Pilkington had retired. Upon the sufficiency of this notice the weight of authority in the Queen's Bench is in favour of the plaintiff, and Mr. Justice Holmes' judgment the other way bears the marks of grave difficulty and doubt, and I agree with the Lord Chancellor that we can not hold this notice to be sufficient within the terms of Deasy's Act, unless we nullify the words of section 14, requiring notice "*of the particulars*" of the assignment. That in itself appears sufficient to dispose of the question. But I go further, and I say that, tried even by the test applied by Holmes, J., this notice is insufficient. It does not even indicate that anything was in fact assigned. It is carefully framed to avoid admitting that Adamson had anything to assign, and it implies that, if anything was assigned, it was not the whole interest of the lessee. Pilkington is described as "one of the owners of the Kilcommin estate," and he is spoken of as already engaged in the management of the property for himself and others of whom Adamson was only one, there being "other parties concerned." Yet the case now made by Adamson is that he was sole owner, and that Pilkington had no interest until the assignment gave him the whole property. In fact this notice is "too clever by half"; and there was a reason for it: it was carefully framed for the purpose of avoiding any admission of the date, nature, scope, or operation, of the alleged assignment, and of keeping the landlord in the dark as to the tenant's title, and consequently as to the mode in which the rent could be recovered, whether accruing before or after the alleged assignment. [His Lordship read the letter of April 28, 1888.] This letter concludes with an innocent invitation :—"Will you kindly acknowledge this letter as a notice that I have assigned *any interest I may have* in the freehold of the property to Mr. Pilkington, and oblige." This invitation was declined, on the specific ground that the notice did not give necessary particulars, and if the answer was delayed until a further gale had commenced, the defendant had only himself to blame for delaying his notice until the last day, or last day but one, of the current half-year. Evidently all the merits of the case are with the plaintiff on the question of the sufficiency of this notice; it is neither candid nor sufficient, and the answer calling for particulars was reasonably prompt, and quite unambiguous.

That being so, Adamson's liability was not transferred, as against the landlord, and it seems clear that unless Pilkington's settlement makes a difference, there must be judgment against Adamson for the whole amount.

The question is, therefore, reduced to this—whether by settling with Pilkington at the trial, the plaintiff lost, wholly or in part, the right to a verdict against Adamson, who was no party to the settlement. I can not see that any question of principal and surety arises against the plaintiff. She sued the two defendants as joint principal debtors; failing in that, she is entitled to treat Adamson as her sole debtor, and whatever right Adamson may have against Pilkington remains upon the assignment, which does not affect the plaintiff as to any rent accruing before a valid notice, and such a notice had not been given when the rent now sued for became due.

Mr. Justice Johnson concludes his judgment with these words:—"As this point was not, so far as I can see, taken at the trial, and was first suggested in the argument by the Court, I think there should be no costs of this argument." Experience leads me to doubt the ultimate success of points not raised by the parties, but which come for the first time from the Bench at a late stage. I plead guilty to having made such points sometimes; but, speaking generally, they seldom come to good, and I don't think this case is an exception. Mr. Justice Johnson gives his reasons thus:—"If, when it turned out that Adamson and Pilkington were not joint assignees, the landlord (the notice being invalid) had recovered against Adamson on his statutory obligation, then Adamson, by virtue of his assignment to Pilkington, would have been entitled *to be indemnified* to that extent by Pilkington." I cannot agree. In the first place, any indemnity as between Pilkington and Adamson must have depended on the terms of the assignment; but, in any case, it would necessarily be an indemnity arising by virtue of a transaction between assignor and assignee, to which the landlord was not party, and what we have to find is an indemnity through which the landlord is to lose his debt. The learned Judge continues:—"As Pilkington, therefore, was the person on whom the liability would ultimately fall, it was Pilkington's interest to settle for the rent with the landlord on the best and easiest terms, and, by entering into the consent, the landlord appears to me to have taken and dealt with Pilkington as assignee and tenant." I think she dealt with Pilkington only as a defendant, and she got what she could from him in consideration of letting him off.

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She gave him terms, whether easy or hard, for which she let him off; but, with all respect, I cannot see how a separate settlement with one defendant without the concurrence of the other, at a trial where both are sought to be made liable jointly, and either may be held liable separately, can operate to discharge the liability of that other to the plaintiff. I test it, as such things may always be tested, by considering whether under the old rules of pleading the defence now set up for Adamson could be put upon the record. It could only be something in the nature of a plea *puis darrein continuance,* and in bar to the further maintenance of the action. But no such plea could possibly be framed. Even if it could have been framed, no suggestion was made at the trial that Pilkington's settlement had altered Adamson's liability. The plaintiff proceeded against Adamson with all the same rights, and subject to all the same difficulties, as before; she surmounted the difficulties by proving Adamson to be her sole debtor. But we must consider how her rights were affected by the fact that Pilkington paid £50 on account of the rent claimed, in consideration of being exonerated from any more. He may have paid £50 for nothing, but in that case, by doing the best he could for himself, he did not affect Adamson's rights or liabilities at all, either as between himself and Adamson, or as between the plaintiff and Adamson. It is clear to me, however, that the £50 was paid on account, and in part discharge, of the rent claimed by the writ, and that the payment enured to discharge so much of that rent for the benefit of whoever was liable to it, and therefore that Adamson was thereby benefited, in that a part of the rent to which he was liable was discharged, for the benefit of both the defendants who were sued jointly. But the point upon which I differ from Mr. Justice Johnson is where he says that, by the settlement with Pilkington, the plaintiff "*precluded or estopped herself* from relying on any invalidity of the notice, and therefore from relying on Adamson's statutory obligation to her, or recovering against Adamson, *in the altered state of the case* after the consent between Pilkington and the plaintiff had been made a rule of the Court." The case was not altered, save by reducing the amount due by £50; to that extent the "alteration" relieved Adamson, but it would be quite contrary to the intention of the parties to the settlement, and, so far as I can see, contrary to legal right, that the plaintiff should be "precluded or estopped" from making the best she could of the case against Adamson, when Adamson resisted to the last, and persisted in defending the case, keeping wholly aloof from Pilkington's settlement. Mr. Justice Gibson's careful and persuasive judgment answers, I think, Mr. Justice Johnson's view, and I refer to it for the reasoning by which it is shown that Adamson could by no possibility rely upon Pilkington's settlement to free himself, and also for the authorities bearing upon that part of the case.

But after reasoning out this result, Mr. Justice Gibson concludes :—"The plaintiff cannot, after releasing Pilkington from the debt save as to £50, go against Adamson for any greater amount than £50." It is not quite clear whether he means the same £50, or a second £50. The foundation of his conclusion is that the release of the one defendant was not a release of the other, but this should have led him to the result that Adamson remained liable for all that remained due, or, in other words, that Pilkington's payment reduced his liability *by* £50, but not *to* £50. In my opinion credit must be given for that amount. The plaintiff is entitled to judgment for the balance, with the costs of the verdict, which should have been directed at the trial. Having regard to the opinions expressed in the Court below, I think it right to state that we do not hold the defendant Adamson's rights against Pilkington, whatever they may be, to be affected at all by the plaintiff's transaction with Pilkington at the trial.

BARRY, L.J. :—

I concur, for the reasons already given. Documents of this kind should be liberally construed, but I am forced to the conclusion that the notice of the particulars of the assignment in this instance was inoperative. It was not only defective, but ingeniously defective, with the object of concealing the real position of Adamson. Then comes the question of the effect of the payment by Pilkington of £50 during the trial. I own that I share with the Lord Chancellor and Lord Justice Fitz Gibbon their inability to understand upon what principle this payment of £50 could be a total release of Adamson from all liability for the sum of £400,

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which he undoubtedly owed, and whatever other defence he may possibly have had, I certainly cannot follow the proposition that there was any estoppel.

In my opinion there was no release, and I am not at all sure that we are not in effect doing almost more than we have power to do in allowing credit to Adamson for the £50, which was paid to the plaintiff by Pilkington; for Pilkington was a stranger, as it were, and was not liable at all. He was sued as a joint debtor; but this he was not, for Adamson was the sole person holding the lessee's interest. Pilkington was nothing but a stranger, and being a stranger to the transaction, I doubt whether a payment by him of £50 was one of which Adamson could claim the benefit; but I agree that the justice and fairness of the case is met by the course which we are now taking, in giving Adamson credit for the £50 so paid and in awarding judgment against him for the balance.

Solicitor for the plaintiff: *W. Bridge.*
Solicitor for Adamson: *C. R. Macnamara.*

G. Y. D.

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1893.
Oct. 27.
Nov. 2.
Appeal.
1894.
April 25, 26.
May 18.

STUBBS *v.* MARTIN.

(1893. No. 2124.)

Land Law (Ireland) Act, 1887, *sect.* 5—*Judicial rent less than rent reserved by lease—Account not taken of over-payments by tenant—Right of action—New statutory right and statutory remedy.*

A lessee served an originating notice to fix a fair rent; and, in the interval which elapsed before a judicial rent was fixed, paid gales of the reserved rent. Before the fair rent was fixed, the lessee assigned the lease to a purchaser, and the fair rent proceedings were continued in the name of the assignee. The judicial rent being lower than that reserved by the lease:—

Held, by the Exchequer Division (*diss.* Palles, C.B.) and by the Court of Appeal, that although no account had been taken between the parties, under section 5 of the Land Law (Ireland) Act, 1887, the lessee could maintain an action for the difference between the rent paid by him since the gale-day next after making the application and the judicial rent.

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The rule that where a statute creates an obligation, and supplies a remedy for its enforcement, that remedy alone must be followed, is subject to this qualification, that the remedy supplied must cover the whole right given.

Motion by the plaintiff to set aside the verdict and judgment entered for the defendant at the trial, and to enter a verdict for the plaintiff for £30, and judgment for the plaintiff accordingly.

The action was brought to recover £30, amount of rent overpaid by plaintiff, and was tried before Mr. Justice Johnson and a jury.

At the trial it was proved that the plaintiff had held certain lands, near Dundalk, from the defendant, under a lease dated 8th March, 1873, at the yearly rent of £35. On the 7th October, 1887, he served an originating notice to fix a fair rent of the said holding. On the 28th December, 1889, he assigned his interest in the said holding to a man named Falkiner, in whose name the proceedings to fix a fair rent were continued. By an order of the Land Commission, dated the 18th March, 1891, the fair rent was fixed at £23. The plaintiff (Stubbs) paid the rent up to 1889; since which date Falkiner paid the rent, and got the deduction of £12 up to 1st November, 1890. The plaintiff then claimed the difference between the former rent and the judicial rent, for the two and a-half years paid by him at the former rate, as money received by the defendant for the use of the plaintiff.

His Lordship directed a verdict for the defendant.

The plaintiff now moved to set aside said verdict and judgment and enter same for him.

Serjeant Dodd (with him *Dickie*), for the plaintiff, cited *Sutton* v. *Walsh* (1); *Davies M'Mahon* (2); *Twiss* v. *Casey* (3); *Burrell* v. *Farmer* (4); *Mayor of Lichfield* v. *Simpson* (5).

H. W. Jackson, for the defendant, cited *Stevens* v. *Jeacocke* (6); *Dundalk Western Railway Co.* v. *Tapster* (7); *Stevens* v. *Evans* (8);

(1) 26 L. R. Ir. 629.
(2) 24 L. R. Ir. 73.
(3) 18 Ir. L. T. R. 83.
(4) 24 Ir. L. T. R. 93.
(5) 8 Q. B. 65.
(6) 11 A. & E. 731.
(7) 1 Q. B. 667.
(8) 2 Burr. 1157.

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44 & 45 Vict. c. 49, sect. 8, and other sections of the same Act; and 50 & 51 Vict. c. 33, sect. 5, and other sections.

Cur adv. vult.

MURPHY, J.:—

I am of opinion that this action lies. In 1887 Stubbs served an originating notice to fix a fair rent. Subsequent to the service of the notice Stubbs had paid to the landlord £12 annually, in excess of the rent found by the Sub-Commissioners. The landlord and tenant stood in this relation to each other—Any payments made by the tenant, after the service of the originating notice, were made on the understanding that it depended on the decision of the Sub-Commissioners, whether or not the landlord was receiving money of the tenant's which he could not retain if the rent fixed was less than that which he was accustomed to pay. So the matter stood for the first gale, and so on up to the fifth gale. Stubbs, before the decision was made, did what he had a perfect right to do, he parted with his interest in the lands to another tenant, Falkiner, who was in occupation of the lands at the time of the decision of the Sub-Commissioners. That decision amounted to this, that the old rent was £12 in excess of what it ought to have been; and, therefore, that the landlord had got into his hands £30 from Stubbs, and £12 from Falkiner. Now that decision having been pronounced, there was a right to maintain an action for money had and received. That right of action arose of necessity from the Act which was passed, giving the Sub-Commissioners power to fix the rent; and the right of action which arose was not a new right, but arose from the common law, as an action for money had and received, on the decision being pronounced. The Act goes on to say "any sum found on such account to be due from the landlord to the tenant shall be deducted by the tenant from the rent thereafter accruing due from him." In my opinion, that provision is placed there as a remedy which can be adopted by the tenant if he chooses. It might be a very convenient course to adopt in the case of small sums; but, supposing it amounted to a year or two years' rent, could it be said he would have to wait two years before he could deduct? I need not put the case of the injustice which would result if this was held to be the only remedy. Stubbs could never deduct the £30, and Falkiner could never deduct £12; for in an account taken between the parties Falkiner could not be allowed credit for what had been paid by Stubbs. Great and palpable injustice would arise if this was supposed to be the only remedy instead of an additional one: whereas if this be taken to be an additional remedy, no harm would be done to any party; and, therefore, I have adopted the view suggested by the plaintiff that it is an additional remedy, and does not take away the right of action for money had and received.

I understand that in fact the Commissioners never do take an account in cases of this kind. The tenant is not to lose his money because they omit to take an account. On the last circuit at Longford the question came before me on an appeal. Counsel for the landlord objected that credit for over-payment could not be allowed, as the Commissioners had not taken an account. I did not admit the objection, but took an account and allowed credit for the over-payment.

ANDREWS, J.:—

I am of opinion that the plaintiff is entitled to succeed in this action, and that the verdict and judgment entered by the learned Judge for the defendant should be set aside, and judgment entered for the plaintiff in the amount of £30. I believe there is no doubt about the amount, at least I have not heard of it. Now, the question arises entirely upon the construction of section 5 of 50 & 51 Vict. c. 33, the Land Act of 1887; but I agree that in construing that section we should look at the general provisions of the statutes of which it forms a part. If the said section simply stopped with the word "application" there would be scarcely anything to argue at all. The 5th section provides that on an application to fix a judicial rent of a holding, judicial rent shall be the rent payable by the tenant of the holding as from the gale-day next after the making of the application. Had the section stopped there a plainer provision could hardly have been devised to give effect to the result contended for in favour of the tenant, and which would only have been carrying out the justice which the Act provided for. Now, the difficulty arises, as has been shown during the argument, by reason of what the law recognises in the construction of a statute, that if a new right is provided by statute, and also a particular remedy, that remedy must be followed, and if the remedy cannot be followed the right cannot be obtained; but that is subject to equally well-settled law that if the remedy which the statute gives is imperfect, and not applicable to all the cases for which on the true construction of the Act it is intended, then it is to be regarded as additional to the remedy that had existed before any such provisions were enacted. At first sight it does not appear very probable that the Act of 1887 would be restrictive in its rights, and that it would have provided an only crumb of comfort for the landlords who were supposed not to be very much delighted with the legislation that had taken place in the earlier enactments, or that it could be regarded as a palliative for the possible deductions which turned out to be the rule. It may be that there is more in the observation that *a priori* the fifth section would have been more restrictive in its operation than the corresponding section in the earlier legislation. However, we must deal with it as it stands, and even if it is incapable of the construction which the plaintiff seeks to put upon it, we can only regret it and agree to pass it by. If, on the other hand, there is a legitimate construction enabling him to sustain the action, then, I think it is in the province of the Court to give it that construction. Now, as to the remedy given by the section, is it coextensive with the right that is conferred? I think Mr. Dickie has shown in two cases, and is able to point to two instances, in which the intention of the legislation would not have been given effect to if the construction for the defendant is to be allowed. My opinion is that that clause was intended for very unusual application, and that in every case in which the rent was fixed the Legislature meant and expressed in clear language that the rent was to be determined by reason of that fixture, and was to relate back and be the rent payable as between the parties from the gale-day next after the making of the application. If, then, you can find a case in which the remedy is not available that fact would go to show that the remedy is an additional remedy. It is not necessary to decide in this case, and I do not decide, what the true construction of the section should be in all cases in the power to deduct given by the section, and how it can be rendered effective. The inclination of my opinion at present is, even in that case, the remedy would be cumulative, but we have not to deal with that now. Assuming that there is a new right conferred by statute, and a new remedy to enforce that right, if that remedy be not applicable to every case provided for by the statute, then, I think, it follows that each case to which the statutory remedy is not applicable has no remedy provided by statute, and in each such case the action would lie, and the consequence must be that effect could not be given to the statute—if not by action—otherwise the statute would be defeated. Now, in this particular case, what is the action which could be taken, or could ever have been taken; and between what parties could it have been taken? I take up the language of the statute to see what is a fair construction of its terms; and, in my opinion, the legislature, or draftsmen, or the wisdom of Parliament—whichever way you may call it—had in view the case that is most frequently occurring, that of the continuing tenant and the continuing landlord, as the cases in which the deductions might be made. It seems to me that the language of the section supports that opinion, "and the Court shall proceed to take an account between the parties." Now, I think, the section shows who the parties are between whom the account should be taken, because it goes on to say, "and the difference between the rent which has been paid by the tenant since the said gale-day," that is, paid by the tenant who has been continuing and paying rent according to my construction of the words "since the said gale-day," and in such a case as that of the continuing tenant who has paid his rent to his landlord there is mandatory language in the statute requiring him to deduct from his rent which shall be afterwards due to his landlord. Now, I do not see how it is possible that that account, if taken, could in the least degree be made applicable to the entire. Of course it is possible to apply it to a small part, say the first gale or even two; but if, according to my view, it is not applicable to the particular case, then the remedy not being a universal one, the statute cannot be given effect to, and it can only be done by the action-at-law. I recollect the case of *Burrell* v. *Farmer* (1) which was heard in the county of Monaghan by Lord Justice Fitz Gibbon. I do not decide the present case with reference to that one as an authority, because it appears to me that all that case decided was that where an account had been taken the remainderman was entitled to the judicial rent that had accrued due during his time. In this case, having regard to the arguments and the cases cited, and my construction of the Act, I have arrived at the conclusion that judgment should be entered for the plaintiff for £30.

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(1) 24 I. L. T. R. 93.

PALLES, C.B. :—

I regret that I cannot concur in the conclusion at which my learned brothers have arrived. I am of opinion that the action is not maintainable, and that, consequently, the judgment directed for the defendant by Johnson, J., should stand.

The facts are few and simple. Stubbs, the plaintiff, held lands from the defendant under a lease of the 8th March, 1873, at a yearly rent of £35. Upon the 31st October, 1887, being before the first gale-day after the passing of the Land Law (Ireland) Act, 1887, he served notice to have a fair rent fixed. On the 28th December, 1889, before the order fixing the fair rent was made, he assigned his tenancy to one Falkiner, in whose name the proceedings were continued pursuant to an order of the Land Commission of 10th March, 1891. On the 27th April, 1891, an order was made fixing the fair rent at £23 a-year. The plaintiff paid the gales of rent that fell due on and from the 1st November, 1887, to and inclusive of the 1st November, 1889, at the old rate, less a certain abatement; and the present action is brought to recover the excess of the sums he paid in respect of those gales, over and above the rent for the same period calculated according to the amount of the judicial rent. Whether, under these circumstances, an action will lie depends entirely upon the true construction of the 5th section of 50 & 51 Vict. c. 33. Before that statute a judicial rent, when fixed, was the rent "as from the period commencing at the rent-day next succeeding the decision of the Court" (44 & 45 Vict. c. 49, s. 8). The 5th section of the Act of 1887, however, enacts, "When the Court on application fixes a judicial rent for a holding, the judicial rent shall be the rent payable by the tenant of the holding as from the gale-day next after the making of the application." These words confer a right upon the tenant which he had not previously had, and I agree that if the enactment had stopped there, that is, if it had not provided any remedy for the enforcement of this new right, the present action would have been maintainable. The enactment, however, does not stop there; it proceeds to confer a remedy for the enforcement of this new right; and it is not, and could not be, disputed that, as a general rule, where the same enactment which confers a new right provides a remedy co-extensive with that right, the right can be enforced solely by such remedy: *Stevens* v. *Evans* (1); *Dundalk Co.* v. *Tapster* (2); *Stevens* v. *Jeacocke* (3). My learned brothers are of opinion that the particular remedy provided by this statute is not co-extensive with the new right created by it; and for that reason, but as I understand for that alone, they are of opinion the statutable remedy is cumulative, and that the present action is maintainable.

I proceed to inquire whether, upon the true construction of the statute, the remedy is not co-extensive with the right. The enactment is substantially this: When the Court on application fixes a judicial rent . . . it shall be the rent as from the gale-day next after the making of the application; *and* the Court shall proceed to take a certain account, and provision is made as to the balance which shall appear due upon that account. This provision as to the balance applies to every possible result of the account (except that of the accounts on both sides being exactly equal, a case in which no remedy is required), and the statutable direction to take the account applies to every case in which the new right has been conferred. This direction is not conditional upon any party applying that it shall be taken, or upon the same persons continuing to be landlord and tenant during the entire course of the proceedings: it is absolute, and the words used are mandatory; they exclude all discretion, and impose an imperative duty upon the Court in every case within the section, or, in other words, in every case in which the new right can have arisen.

Now, this proceeding to take an account is the initiation of the

(1) 2 Burr. 1157. (2) 1 A. & E. 667. (3) 11 Q. B. 731.

statutable remedy. It is useless for any other purpose, and the imperative character of the direction that it is to be taken in every case in which the new right is conferred, indicates an intention in the legislature that the remedy should be applicable to every such case. What is the account so directed? "An account between the parties of the difference between the rent which has been paid by the tenant since the said gale-day," *i. e.* the gale-day next after the making of the application, "and the judicial rent." Thus the two *termini* of the account are fixed. It is to commence with the gale-day next after the making of the application, it is to terminate with the date of the order. On the one side is to be the rent which accrued due during this period, calculated at the rate of the judicial rent; upon the other side are to be the sums paid for rent which accrued during that period. But the rent so paid is described as paid by "the tenant," and therefore that expression must, in a case where there has been an assignment of the tenancy pending the proceedings, include successive tenants, where each has paid some part of the rent which accrued due during the period in question. This construction of the words "the tenant" is in accordance with its definition in sect. 58 of the Act of 1881, a definition incorporated with the Act of 1887 by sect. 34 of the later Act. I may observe that this construction reads "tenant" in the same sense as the same word must be read where it occurs earlier in the section, in the expression, "rent payable by the *tenant* of the holding as from the gale-day next after the making of the application." "Tenant" here plainly must include the persons who shall be tenant successively during the tenancy.

The account, therefore, is not necessarily to be between one particular landlord and one particular tenant only. It must include all sums which accrued due, and were paid respectively for rent during the specified period, between, on the one side, all those who, during that period, were successively landlords, and, on the other, all the successive tenants.

Now, I have shown that this account is directed to be taken in every case, so also in every case must the account show some result. Either the sums paid for rent must be exactly equal to the rent which accrued due, or must exceed it, or be less than it.

In the first case no order is required, because no sum has been paid beyond what, in the result, ought to have been paid. In the second case, the statute treats the sum paid over that which accrued due as a "sum found on such account to be due" from the landlord to the tenant; and it provides a specific remedy for the reimbursement of this sum to the tenant, not by constituting it a debt recoverable by action, or by imposing a duty to pay, but by directing that it shall be deducted by the tenant from the rent thereafter accruing due from him to the landlord.

In result, then, the remedy provided by the statute is not for the aggregate of the sums paid in excess of such of the gales as were over-paid, which are the sums for which, if for anything, an action at common law would have been maintainable, but for the net balance which shall appear over-paid in respect of all the gales. This is not a mere formal difference. It shows that the statutable remedy is plainly inconsistent with the existence of a common law right of action such as the present. Suppose, for instance, Falkiner had not paid the rent which accrued due on the 1st May, and 1st November, 1890. In that case the balance on the account, taken as a whole, would be in favour of the landlord, and the section plainly indicates that in such a case no deduction is to be made from the future rent. But if the present action lies at all, it must equally have lain in that case; and the result would be that although the Legislature intended that the only liability of the landlord should be for a net balance on one entire account, the Court, by dividing into two the period over which that one account was to extend, might render him liable in respect of one part of the account, whilst upon the whole account the balance would have been due to him, not by him.

It is further to be observed that the construction suggested renders the landlord liable to pay back that which he had rightfully received, whilst the intention of the statute was that it should be not paid back, but deducted from a future payment; and further, that it anticipates the period of payment by creating a liability to pay as of the date of the order, instead of a liability to submit to a deduction as of the date of the gale-day next after the order.

Grave reasons are, in my opinion, essential to justify a construction which would have such effects; and let me now turn to the reason insisted on. It is said that if the person who was landlord at the time of the service of the notice were tenant for life, and if he died before the order, having previously received in full several of the gales of rent which accrued due after the service of the notice, the excess of the sums so paid over the judicial rent would, upon the construction which I have adopted, be payable by the remainderman. This is said to be an injustice which the Legislature could not have intended, and that it renders impossible any construction which would involve it. Were it material, I might point out something involved in the alternative construction, which might also be termed an injustice; but instead of balancing these so-called injustices, I prefer to recur to the words of the enactment in reference to the special matter germane to this consideration, that is, to the fund out of which the tenant is to be recouped the excess of rent paid. As to this, I first call attention to the last provision of the section, which applies to the gale-day next following the passing of the Act. Where this provision is applicable, the fund from which the tenant is to deduct the excess paid on account of this gale is not, as on the construction suggested, it ought to have been the future rent which may accrue due "to the landlord who has been over-paid;" but is "the amount of the judicial rent payable by him," without limitation as to the person to whom it is payable. Therefore, if, in such a case, a landlord, tenant for life, were served with notice before that gale-day, and died after he had received that gale of rent at the old rate, and the proceedings were continued against the remainderman, the excess of that payment over the rent at the judicial rate would plainly be payable out of rent due to the remainderman. Again, take a case to which the earlier provision of the section applies. Assume a tenancy to bind the fee, the reversion being settled upon a tenant for life with remainder over. Notice of the application is served upon the tenant for life, and the order fixing the fair rent is made during the continuance of the life estate. A substantial sum is found due upon the account by the landlord, the tenant for life, to the tenant. The tenant for life immediately afterwards dies. The balance due on this account is, by the words of the section, to be "deducted by the tenant from the rent thereafter accruing due from him." These words cannot be limited to rent accruing due to the tenant for life. To hold that they were would be to insert words in the section for which there is no warrant. In result then, in the two cases I have put, the very effect would ensue which, it is said, it is impossible that the Legislature could have intended.

Similar reasoning applies to the third possible result of the account, viz. of a balance being found due to the landlord.

Upon the whole, my view of the section is that the Legislature contemplated that the account should be taken in every case in which a fair rent was fixed under the Act, that is, in every case in which the new right was conferred; that that account was to be a general one, between the estate on the one hand and the tenant on the other; and that if, in result, it appeared that the estate had received too much for past rent, the excess was to be allowed as against future rent. The section does not appear to me to deal with the rights of successive landlords or tenants respectively, *inter se;* it leaves it to the ordinary law to adjust those rights, and it may be that a remainderman who was forced to allow credit out of rent payable to him, for a sum overpaid to a tenant for life, could recover the amount from the estate of the tenant for life. Be this, however, as it may, it appears to me that when the Legislature determined to permit a landlord to enforce by legal proceedings, as for rent, an amount larger than that which might, in event, become payable, it was impossible to frame any scheme in reference to repayment which might not involve some hardship. If the remedy of the tenant were to be a personal one by action, he might lose the amount by the insolvency of his debtor. On the other hand, a right of deduction from future rent would involve a possible hardship incident to the death of a tenant for life. My view is that, of the two courses, the Legislature thought fit to choose the latter. Unquestionably it gave the right of deduction from the future accruing rent in general, and not out of the future rent accruing to the particular landlord to whom the excess had been paid. The generality of these words occurring twice in the section, taken in connexion with the entire scheme of the section, appears to me to be conclusive.

The decision of Lord Justice Fitz Gibbon in *Burrell* v

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Farmer (1) has been relied on. That decision was, in my view, unquestionably correct. There the account directed by the section had not been taken. That circumstance is referred to in the observations attributed to the Lord Justice, and I am clear that until the account has been taken there is no right of deduction against the remainderman. That circumstance was the *ratio decidendi* there. As to any observations which in the unrevised report before us may appear to go beyond it, I know too well the care with which the Lord Justice always guards himself against laying down, in cases upon the construction of the Land Acts, general propositions upon questions which do not arise, to attribute them to him.

In my opinion the verdict should stand.

J. P. B.

Appeal.
1894.
April 25, 26.
May 18.

The defendant appealed to the Court of Appeal (WALKER, C., PORTER, M.R., and FITZ GIBBON and BARRY, L.JJ.).

H. W. Jackson (with him *Gordon, Q.C.*), for the appellant:—

The verdict for the defendant, directed by the learned Judge at the trial, was right and should be restored. The 5th section of the Land Law (Ireland) Act, 1887, confers a new right upon the tenant, namely, the right to have his judicial rent calculated "as from the gale-day next after the making of his application" to the Court. The Legislature, however, has chosen to clog this new right, with a condition, namely, that any pecuniary advantage coming to the tenant under this new right shall be asserted by deduction out of future gales of rent, and not by direct payment to the tenant. The very same section provides the particular method and machinery by which the amount so to be deducted shall be arrived at, and imperatively directs the Court in every case to take the necessary account; it specifies clearly the extent of the account, commencing with the gale-day next after the making of the application, and terminating with the order of the Court. The authorities are clear that where the same statute confers a right and provides a remedy, that right can be enforced only by that particular remedy, unless it is not co-extensive: Maxwell on Statutes, 2nd Ed. 495: *Stevens* v. *Evans* (1); *Bishop of Rochester* v. *Bridges* (2); *Stevens* v. *Jeacocke* (3); *Reg.* v. *County Court Judge of Essex* (4); *Dundalk Western Railway Company* v. *Tapster* (5).

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(1) 24 Ir. L. T. R. 92.

It is contended that the remedy is not co-extensive with the right, because a landlord who was merely tenant for life might have received the full rent for some years and then died, so that the right of deduction out of future gales of rent due to him would be nugatory. This argument is founded upon a fallacy, because the Act does not speak of any particular landlord; it deals with the estate of the landlord on the one side and the estate of the tenant on the other. The entire scope and plan of the Land Acts is to establish three unities, viz. one landlord, one tenant, one holding. The definition of both landlord and tenant include their successors, and no attempt is made to administer the rights of either party *inter se.* The deduction is to be made from the rent thereafter accruing due from the tenant (whoever he may be at the time), and the landlord of the day must submit to it. It may be a reversioner would have a right over against the personal representatives of a deceased tenant for life. The remedy is perfectly adequate, as the tenant is his own paymaster, and is not liable to the risk of suing an insolvent landlord. This provision was clearly intended as a relief to the landlord, and is the one crumb of comfort to him in the section—it saves him from being suddenly called upon to pay out of his pocket, perhaps, a very large sum at once, as would be the case on a large estate, where a long list of tenants' applications had been decided at the same time. Besides, the intention manifestly was to give a right of deduction only. If a concurrent right of action had been contemplated the Legislature had only to follow the terms of the 66th section of the Land Law and Tenant (Ireland) Act, 1870, portion of the same code, where both rights are given concurrently under somewhat similar circumstances. Why should the time of recoupment be anticipated to the injury of the landlord? This account must be taken in every case (*Sutton* v. *Walsh*; see judgment of Gibson, J. (1)). It is a condition precedent: the duty of taking it is imposed on the Court, without any preliminary application by anyone. "The Court *shall* proceed to take it." Unless and until this is done, how can anyone estimate the sum which shall be found to be due? and it is only as to the sum so found to be due that the right of deduction is given. Any voluntary abatements which the landlord may have allowed to the tenant are items which should be set off against the judicial abatement: *M'Cartan* v. *Murray* (2). The plaintiff here has taken upon himself to take the account himself, and arbitrarily to fix the same. The statute conferred this power upon the Court alone. Even assuming a concurrent right of action lay, it would be only for the *balance* "*found to be due.*" Here also the taking of the account must be a condition precedent. No other conceivable purpose can be served by this account. It cannot be assumed that these elaborate provisions were enacted without a purpose.

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(1) 2 Burr. 1157.

(2) 1 B. & Ad. 847.

(3) 11 A. & E. 731.

(4) 18 Q. B. Div. 704.

(5) 1 Q. B. 667.

But in any event the plaintiff is not the "tenant" to whom alone this right is given. He sold his interest in the farm to the present tenant Falkiner, who alone can claim recoupment. The definition of "tenant" does include "successors," but not "predecessors." If it did, the 7th section of the Act of 1881 would have been superfluous. Suppose the Court now take the account between tenant and landlord, that is to say between Falkiner and defendant, and find a sum of, say, £25 to be due by defendant to Falkiner, what defence could defendant rely on? Falkiner would pay himself by stopping the £25 out of future gales. Or, better still, suppose this account had been taken, and Falkiner had stopped the £25, would anyone contend that this action lay? *Burrell* v. *Farmer* (3) is in favour of the appellant, for there the condition precedent, viz. the taking of the account, had not been complied with.

Alfred Dickie (with him *Serjeant Dodd* and *T. L. O'Shaughnessy, Q.C.*), for the respondent:—

The verdict, as entered by the majority of the Exchequer

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(1) 26 L. R. Ir. 639. (2) 24 Ir. L. T. R. 79. (3) *Ibid.* 93.

Appeal.
1894.
STUBBS
v.
MARTIN.

Division in this case, should stand. The whole question turns on the construction of sect. 5 of the Land Act of 1887. The principle involved is very cleary laid down by Lord Kenyon in *Beckford* v. *Hood* (1). The remedy in the case (if a remedy at all) is not co-extensive with the right, and is not a perfect remedy in all cases. Suppose that a tenant of a farm paying a large rent has served notice to have a fair rent fixed, and that a period of two years elapses before it is fixed, and that a substantial reduction is given, and that on the day on which the decision is given a Railway Company buys up the interest of both landlord and tenant compulsorily,—there would be no one then from whom the tenant could make a deduction, and so there would be no remedy. Again, in a case like *Burrell* v. *Farmer* (2), where the interest of the landlord is only a tenancy for life, if the landlord dies the tenant has no one from whom he can deduct any sum he has over-paid. Here are two cases where there is manifestly no remedy given by the section. Therefore the remedy is not co-extensive with the right, and the right of action remains. Of course if a tenant who was in a position to deduct brought an action, the Court, in its discretion, might refuse to give him costs. The landlord here has £30, which manifestly does not belong to him, and he will not give it to anyone. If Falkiner claims it, he says no account has been taken, and if Stubbs claims it, he says you are not the proper person to claim it. Taking an account by the Land Commission is not a condition precedent. A Judge and jury is perfectly competent to take such account. There never were any reductions given, and it has all along been admitted that the amount in dispute was £30. [They also cited *Sutton* v. *Walsh* (3); *Davies* v. *M'Mahon* (4); *Twiss* v. *Casey* (5).]

Cur. adv. vult.

Walker, C.:—

May 18.

The question in this case is of considerable importance, not only between the parties, but as one of general application. It depends on the true construction of the 5th section of the Land Law (Ireland) Act, 1887.

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(1) 7 T. R. 620.
(2) 24 Ir. L. T. R. 92.
(3) 26 L. R. Ir. 630.
(4) 24 L. R. Ir. 73, 447.
(5) 18 Ir. L T. R. 83.

The plaintiff held lands under a lease, dated 8th March, 1873, at a yearly rent of £35, payable in May and November. On October 31, 1887, he served an originating notice to have a fair rent fixed. It was not fixed till April 27, 1891, and in the interval, *i.e.* on December 28, 1889, he assigned his holding to Falkiner, in whose name the proceedings before the Land Commission were continued. The plaintiff paid the rent at the reserved amount up to and including November 1, 1889. Falkiner thenceforth continued to pay the rent at the same rate until the fair rent was fixed. The judicial rent was fixed at £23, being £6 less half-yearly than the reserved rent. Falkiner, the assignee, applied to the landlord for the difference between the two rents covering the whole period, but he refused to allow more than one year, £12, and as he refused to make any allowance or payment to Stubbs, the latter brought the present action on April 28, 1893, claiming £30 to be payable to him.

No account was taken by the Land Commission at the time of, or after, the fixing the fair rent.

At the trial Mr. Justice Johnson directed a verdict for the defendant. The plaintiff appealed to the Divisional Court, and after argument, Mr. Justice Andrews and Mr. Justice Murphy gave judgment in favour of the plaintiff, but the Lord Chief Baron dissented from that judgment, and considered that the verdict for the defendant should be upheld.

Under the 8th section of the Act of 1881, a judicial rent is declared to be the rent, "as from the period commencing at the rent day next succeeding the decision of the Court." The 60th section gave an artificial extension to that section in the cases to which that section applied. The whole scheme of the Act of 1881, on this head, was to set free the contract rent, and adjust it by the tribunal of arbitration created by the Act, and when this is done in the tenant's favour, the adjusted rent becomes the real rent, and is adjusted from the period when the jurisdiction is invoked, under the terms of sect. 5 of the Act of 1887, which owes its passing to the block in the Land Commission Court. [His

Lordship read the section.] The general rule of law regarding the interpretation of such enactments is stated in the judgment of Mr. Justice Andrews. [His Lordship read from "if a new right is provided by statute" to "before any such provisions were enacted," *ante*, p. 74.] I think it is a serious question whether the adjustment of the rent in favour of the tenant or landlord, as the case may be, can be regarded as a new right within the meaning of the rule, though it is certainly an alteration of the contract between them arising upon events brought into existence by the Act.

But even if it be treated as a new right, or obligation created by the statute, the rule that when a statute creates an obligation and a remedy for its enforcement, the remedy must be followed, is subject to this qualification that the remedy supplied must cover the whole right given: *Shepherd* v. *Hill* (1); *The Vestry of St. Pancras* v. *Batterbury* (2).

What is the whole right *prima facie* conferred? It is not disputed that it would give *prima facie* to Stubbs a right of action to recover his over payments, just as in the branch applicable to the landlord being the creditor there is the simple enactment that the sum shall be paid in addition to the rent, leaving the landlord to his action at law for the recovery. Let us now see the remedy. If the terms of the section are the exclusive remedy, it will follow that in many instances a person situated as Stubbs is would lose all benefit, and so in the case of a break in the landlord's title the whole rent might be deducted from a remainderman or the remainderman landlord might receive the whole from the tenant.

I think the second branch of the section must be read as applicable to what will be always the usual case of the parties and their rights continuing the same, and the accounting parties the same. Then the remedy may be applied with convenience and without injustice. But where the remedy cannot be applied without injustice, or without—if injustice is not to be perpetrated—leaving rights free to be worked out by a procedure unspecified, and therefore by action at law, I think the true interpretation of the section is to hold that the remedy is not co-extensive with the right, and that in a case like this it may be worked out by action. If I am right, this involves the decision that the taking of the account in a case like this was not a condition precedent. Whether it would be so in any case, I do not think it necessary to decide. The appeal will therefore be dismissed.

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(1) 11 Ex. 55.

(2) 2 C. B. (N. S.) 486.

PORTER, M.R. :—

I am of the same opinion, and I have nothing to add to what the Lord Chancellor has said upon the two questions with which he has dealt.

I further think, however, that it is very questionable whether this is a new remedy at all within the legal meaning of that word. It seems to me that the effect of the section is only to substitute a new and different amount of rent for the old rent; and it is very doubtful whether the right (though expressly given) to deduct what is a debt is a new *remedy* within the meaning of the rule. I have always considered that where a remedy is spoken of in a legal sense, it means a mode of recovering something by process in the Queen's Courts. In my opinion this right of deduction is an incident of the debt, and not a remedy. The power given to the Land Commission of adjustment and of ascertaining the amount is conferred by a provision which is directory, not mandatory; and if this be so the taking of the account mentioned in the section is not a condition precedent to the exercise of the right of deduction. It never can have been intended to confer a right to deduct from A that which is due by B, and which never was owing by A at all. The right to deduct must mean a right to deduct when the facts and circumstances render such a deduction consistent with common justice. I am therefore of opinion that the decision of the majority of the Exchequer Division was correct and should be affirmed.

FITZGIBBON, L.J. :—

I entertain a strong opinion that the Land Act, 1887, s. 5, does not create any new right, so as to come within the rule that where a new statutory right has been conferred and a new statutory remedy to enforce it has been prescribed, that remedy alone can be pursued. I think that the statute merely provides a means of altering the amount of money payable by the tenant to the landlord; it gives no new right to recover that money; it leaves it *in dubio* in whose favour the alteration may be; it appears to me studiously to leave all the rights of the parties to depend on the old obligations; and it provides for a settlement of the account between them.

But further, I cannot find any new remedy in the section; if there be a new remedy, it is not applicable in every case; yet I think the provision has a very useful scope. "The Court *shall* proceed to take an account," not in every case, not as a condition precedent, not even as a remedy, but as a convenient thing, whenever right and necessary, and when required so to do. If the landlord has got more rent than he ought to have done, he gives an allowance or set-off, to avoid the "double trouble" of paying back, and the tenant has the advantage of having paid so much of his rent in advance. On the other hand, if the landlord is entitled to more than he has received, the section makes the amount a debt from the tenant, to be paid "as an addition to the rent," but in that case there is no new or special remedy under the statute at all.

Furthermore, the machinery provided by the section cannot work when there has been a change in the parties.

The defendant has no merits; he would not allow Falkiner to deduct the amount. He wanted to let Stubbs fall to the ground between two stools, while he kept the money in his own pocket. Now he must pay the £30 to the man who originally gave it to him, because he refused to allow it to be applied as it ought to have been.

BARRY, L.J.:—

I have great doubt and difficulty in this case. I fear we are supplementing an ill-drawn statute by judicial legislation. On the whole, however, having regard to the fact that the merits are entirely against the defendant, I allow my judgment to go with that of my colleagues.

Solicitor for the plaintiff: *Dickie.*
Solicitor for the defendant: *Bailie.*

G. Y. D.

Q. B. Div.
1894.
Oct. 30.
Nov. 1.

JAMES DOHERTY *v.* MARGERY NELSON (1).

Sheriff—Fi. fa.—*Judgment* de bonis testatoris—*Executor* de son tort—*Chattels real of a deceased*—"*In the hands of the defendant.*"

Under a writ of *fi. fa.*, founded on a judgment *de bonis testatoris* against an executor *de son tort*, the sheriff is authorised to seize and sell the chattels real of the deceased in the possession of the defendant.

Special Case, stated by Andrews, J., sitting as Judge of Assize at the county Donegal Summer Assizes, 1894, on the hearing of an appeal from a civil bill decree in ejectment on the title. The material facts of the case were contained in a statement of admissions to the following effect.

Neal Nelson was at the time of his death possessed of the land now sought to be recovered, as tenant from year to year; he died on the 7th April, 1891, intestate; no legal representative was raised to him. His widow, the defendant, Margery Nelson, was accepted by the landlord as tenant of the premises from the 1st November, 1891, and the landlord's agent indorsed a memorandum to that effect on receipts for rent due by the deceased, and paid by the defendant, in respect of the farm; subsequently the defendant received receipts for rent in her own name; and, on the 14th June, 1892, obtained from the landlord a lease of the premises for 100 years from the 1st November, 1892. On the 25th March, 1893, Bridget Doherty obtained judgment against the defendant Margery Nelson as executrix of the said Neal Nelson (2); a writ of *fi. fa. de bonis testatoris*, issued thereunder, and was lodged with the sheriff on the 27th March, 1893, and was duly executed by him. On the 21st September, 1893, the sheriff (who had seized and put up for sale the farm) assigned to the plaintiff "the interest (if any)

(1) Before Harrison, Johnson, and Holmes, JJ.

(2) The judgment ran:—"That the plaintiff recover against the said defendant £34 9*s.* and £5 16*s.* costs, to be levied off the goods and chattels of the said Neal Nelson, deceased, in the hands of the said Margery Nelson,

of the said Neal Nelson" therein. Previous to the sale by the sheriff, but subsequently to the lodgment with him of the writ, the defendant had notified to the sheriff that she had deposited the lease of 14th June, 1892, with a creditor by way of equitable security.

The question for the opinion of the Court was, shortly, whether upon these facts so admitted, the decree for possession ought to be affirmed simply, or with what variation, or to be reversed, or whether, having regard to, or irrespective of, 52 & 53 Vict. c. 48, s. 5, any other or what order ought to be made upon the said appeal.

Henry, for the defendant:—

The question at issue is how far, if at all, a judgment *de bonis testatoris* against a defendant as executor of a person deceased is enforceable under a writ of *fi. fa.* against the chattels real of the deceased. Here a judgment in the ordinary form was obtained against the defendant, as executrix of Neal Nelson, deceased, and the sheriff seized and sold the interest (if any) of the deceased in the farm of which the defendant was in possession. I submit that the sheriff's assignment to the plaintiff is inoperative upon three grounds:—1. The term had never, legally, "come into the hands of the defendant" at all, so as to satisfy the terms of the judgment. [HOLMES, J.: I always understood that the words "in the hands of the defendant" were introduced in a judgment against an executor merely so that, if there were not sufficient goods, the *si non* clause might come into force.] 2. Even if the defendant's possession of the land were sufficient to satisfy the terms of the judgment, still that would be a wrongful possession, not a legal interest such as a sheriff can validly seize and sell. Strictly speaking, the title would be outstanding in the Judge of the Probate Division. 3. There was no legal interest in existence representing the term held by the deceased, the defendant having (after an implied surrender) taken out a new lease.

executrix as aforesaid, to be administered, if she hath so much thereof in her hands to be administered; and if she hath not so much thereof in her hands to be administered, then the sum of £5 16*s*., the costs, to be levied off the proper goods and chattels of the said Margery Nelson."

[HOLMES, J.: Would not the interest seized be the tenancy from year to year of the deceased?] The old tenancy was gone. It would be necessary to obtain the declaration of a Court of Equity that the new lease was a graft, before it could be connected with or identified with the old tenancy from year to year which had ceased to exist. The sheriff could not treat the old tenancy as still in existence.

If an executor *de son tort* can validly assign a term, as he may a chattel personal of the deceased, the surrender to the landlord puts the plaintiff out of Court. Upon this see 3 Bacon's Abr. Exor. (B); *Garth* v. *Taylor* (1); *Hamill* v. *Murphy* (2); *Doe* v. *Glenn* (3). This surrender must, however, in any event be accepted, upon the admissions, as valid, and as having determined the existence of the tenancy from year to year.

[HOLMES, J.: The defendant never became the rightful owner of the chattels real or personal of the deceased; a legal representative, if raised, could have recovered them. The sheriff could seize them, because they were the property of the deceased. What startles me is that every argument you use against seizing a chattel real seems to apply equally to seizing any personal chattel of the deceased of which an executor *de son tort* is in possession.] But moveables are actually taken by the sheriff, and passed by him to the purchaser; the sheriff cannot take possession of chattels real; if he goes on the lands to take possession of them, he is liable in trespass: *O'Brien* v. *Murray* (4). [JOHNSON, J.: The distinction is between what may pass by delivery, and what may pass only by bequest or deed. HOLMES, J.: Cannot the sheriff seize chattels real of the deceased which a rightful executor has never seen?] Entry by an executor is necessary in the case of chattels real in order to make him chargeable: Wentworth, De Off. Exec., 227; and the true rule is, I submit, that the sheriff can only seize chattels (whether personal or real) with which the executor would be chargeable. [JOHNSON, J., referred to 2 Preston on Conveyancing, p. 319, and *Mayor of Norwich* v. *Johnson* (5)].

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(1) 1 Freem. 261.

(2) 12 L. R. Ir. 400.

(3) 1 A. & E. 49.

(4) 17 Ir. C. L. R. 50 [and see *Harley* v. *Harley*, 11 Ir. Ch. R. 464, 465].

(5) 3 Lev. 39.

[Holmes, J.: If one is to construe the terms of the writ strictly, it would seem to be confined to goods of the deceased come into the hands of the defendant. If the defendant be a rightful executor, it may be said that, although the goods have not come to his hands, yet they are constructively in his hands; while in the case of a wrongful executor they might be held not to have come into his hands if he had not intermeddled. A rightful executor, by proving the will or taking out a grant of administration, becomes the owner of the property without actually taking possession; on the other hand, goods can only be said to have come into the hands of an executor *de son tort* where he actually takes possession of them.]

The true remedy is that, when a plaintiff gets judgment against a defendant "as executor," and does not succeed in levying, he can bring a *devastavit*. This has in fact been done against an executor *de son tort* in *Ennis* v. *Rochfort* (1). In *Cresswell* v. *Cresswell* (2), where the defendant had died after the judgment was entered, Fitz Gerald, J., refused to allow execution to be issued against his widow as executor *de son tort*, saying that nothing could be done against the lands of the deceased until a personal representative had been raised to him.

Wylie, Q.C., for the plaintiff.

There is no distinction between chattels personal and chattels real in the hands of an executor, rightful or tortious, in respect of seizure by the sheriff. Each is sued as executor simply (5 Co. 30 (a)). In the case of an executor *de son tort*, the plaintiff proves that the defendant has intermeddled without legal right to do so. This has always been held sufficient; and the sheriff, acting under the judgment and writ, can seize chattels personal and chattels real equally. Both are "goods": *Re Morris* (3); *O'Brien* v. *Murray* (4). Entry may be necessary in the case of a term so as to make the executor chargeable, but the sheriff can nevertheless seize the interest of the deceased under a judgment *de bonis testatoris*. If the judgment debtor dies after the writ has issued and before lodgment with the sheriff, the sheriff can still execute the writ when lodged wherever he can find his goods. Assuming that the sheriff can seize and sell personal chattels in the hands of an executor *de son tort*, he is equally entitled to seize and sell chattels real. What constitutes a seizure is discussed in *O'Brien* v. *Murray* (1).

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(1) 14 L. R. Ir. 285.

(2) 13 Ir. L. T. 374.

(3) 3 L. R. Ir. 451.

(4) 17 Ir. C. L. R. 49.

By entering upon the chattel real of the deceased the defendant became executor *de son tort* of the term—Williams Executors (Ed. 1879), p. 209, and authorities there cited—and was chargeable either as executor or as assignee: *Paull* v. *Simpson* (2), *Williams* v. *Heales* (3), *Fielding* v. *Cronin* (4). [HOLMES, J., *Paull* v. *Simpson* (2), would go to show that a *tort* executor has the right to assign a term.] He can make a good assignment of a term "in due course of administration": Williams Exors., p. 222 (ed. 1893); Bacon's Abr., Exor. (B), 2; but the *onus* would lie upon his assignee to prove this.

A judgment *de bonis testatoris* operates on the estate of the deceased. It is necessary for the institution of proceedings in the Courts that there should be as defendant an executor, rightful or wrongful; but, this formality complied with, the judgment and writ take effect against the interest of the deceased. What the sheriff assigns is the interest of the deceased in the farm; and the sheriff's deed takes the estate out of the Judge of the Probate Division in the case of an executor *de son tort*, just as, in the case of a rightful executor, it would take the estate out of the executor.

Williams v. *Williams* (5) merely decides that, on a personal judgment against a defendant, the sheriff cannot seize, or sell the chattels real of a deceased of whom the defendant is a *tort* executor. See also *Malahide* v. *Moran* (6), *Williams* v. *Hepenstal* (7).

Henry, in reply.

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(1) 17 Ir. C. L. R. 49.
(2) 9 Q. B. 365.
(3) L. R. 9 C. P. 177.
(4) 16 L. R. Ir. 379.
(5) 20 Ir. L. T. R. 46.
(6) 8 L. R. Ir. 307.
(7) Ir. R. 7 C. L. 514.

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[Reference was also made during the argument to *Russell* v. *Moore* (1), *Kearney* v. *Ryan* (2), *Yardley* v. *Arnold* (3).]

Harrison, J.:—

The case has been very satisfactorily argued by counsel; the authorities have been fully brought before us; and we are all of opinion that the plaintiff is entitled to recover, and that the decree of the learned Judge must stand. To go back to the book which has been cited on both sides, a book of great authority, Williams on Executors, the question how far an executor *de son tort* of a term may exist is stated and disposed of, and reference made to the authorities on the subject. On page 209 (Edition of 1879) it is stated:—" So there may be a *tort* executor of a term of years; as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate; though with respect to a term of years in reversion there can be no executorship of this nature because it is incapable of entry," the authorities cited being Godolph., Pt. 2, c. 8, s. 5; *Mayor of Norwich* v. *Johnson* (4); *Garth* v. *Taylor* (5), and 2 Preston on Conveyancing, p. 319, *et seq.*, to which my brother Johnson has referred. That is the statement in Williams.

The present case is brought within these authorities, for the defendant entered upon these lands, and took possession of them, claiming the particular estate. These facts are apparent on the case stated; for, upon the death of her husband, who was tenant from year to year, his widow, the defendant, continued in possession, the landlord dealt with her as tenant, and subsequently gave her a new lease. It is not necessary for us to consider that lease, for the defendant had taken possession of the tenancy from year to year. An action was brought against her on foot of a debt of the deceased, and judgment entered against her in the ordinary form. [His Lordship read the curial part of the judgment and continued:] The judgment for costs is personal; the judgment for the debt is against the assets " in the hands of the defendant." A great deal has been said about the words " come into the hands of the defendant," but the objection made was sufficiently answered during the argument. My brother Holmes asked what was the difference between the power of an executor *de son tort* to deal with chattels personal and chattels real, and in answer it was suggested that personal chattels can be handed over, and pass by mere delivery. But chattels real also may be assigned by a wrongful executor "in due course of administration." This judgment, entered formally by a creditor of the deceased, authorized the sheriff to seize the term. The sheriff seized and sold; the purchaser brings an ejectment, and he is, in our opinion, entitled to succeed. Our answer will therefore be that, upon the facts admitted, the decree should be affirmed.

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(1) 8 L. R. Ir. 318, 332.

(2) 2 L. R. Ir. 61.

(3) 10 M. & W. 141; Carr. & M. 434, 438.

(4) 3 Lev. 35; 3 Mod. 90; 2 Show. 457.

(5) 1 Freem. 261.

JOHNSON and HOLMES, JJ., concurred.

Solicitors for the plaintiff: *Doherty & Co.*
Solicitor for the defendant: *T. O'Kane.*

A. E. R. J.

FRANCIS MAC CORMACK *v.* BRIDGET COURTNEY AND MICHAEL KEANE (1).

Q. B. Div.
1894.
Jan. 25.

Special Case stated by Judge of Assize—Question of law—27 & 28 Vict. c. 99, *s.* 35—*Statute of Limitations—Possession of land by next-of-kin of deceased tenant—Character of such possession, whether fiduciary or adverse—Executor* de son tort.

Upon a Special Case, stated under 27 & 28 Vict. c. 99, s. 35, by a Judge of Assize, the Divisional Court can express an opinion upon a question of law only—not upon a question of fact, nor upon the question whether there was or was not evidence to sustain a finding of fact.

Therefore, where the Special Case stated that, on K.'s death, in 1864, K.'s widow, B., entered into possession of K.'s farm, and (as a fact) was in possession of one undivided third in her own right, and of the other undivided two-thirds as bailiff for her son, M., then an infant, and that therefore M. had, under the statute, acquired a title to said two-thirds share, and that accordingly the Judge, being of opinion that the plaintiff's right, as administrator, was barred by the statute, dismissed the civil-bill appeal in ejectment against B. and M., brought by M'C., who had, in 1892, been appointed by the Queen's Bench Division (in an action between D. and M.) receiver by way of equitable execution over the beneficial interest of M. in the assets of K., and who, having in 1893 taken out letters of administration to K., brought this civil-bill ejectment as such administrator; and where the question submitted for the opinion of the Court was whether the plaintiff, as administrator of K., or as such receiver, was entitled to a decree for the entire or any part of said holding:—

Held, that, upon the findings, the character of the possession of the defendants was inconsistent with any fiduciary relation towards the estate of the deceased, and that the Judge was therefore right in affirming the dismiss.

Mulhern v. *Dorian* (17 Ir. L. T. R. 74) distinguished; *Rankin* v. *M'Murtry* (24 L. R. Ir. 290) discussed.

Special Case stated for the opinion of the Queen's Bench Division by Palles, C.B., sitting as Judge of Assize at the Summer Assizes, 1893, for the county of Galway, on the hearing of an appeal from the decision of His Honor Judge Henn, dismissing the plaintiff's civil-bill ejectment on the title. The case stated was to the following effect.

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(1) Before O'Brien, Johnson, Gibson, and Madden, JJ.

Patrick Keane was at the time of his death possessed of a holding of land at Tygreenau, in the county of Galway, as tenant thereof from year to year, the valuation not exceeding £30 a-year. Being so possessed, he died intestate in November, 1864, leaving him surviving his widow Bridget (now the defendant Bridget Courtney) and an infant son, the defendant Michael Keane, who for the purpose of this case may be assumed to be the only child and sole next-of-kin of said Patrick Keane.

A personal representative was not raised to Patrick Keane till the 10th March, 1893; but, from the time of his death to the present time, the defendant Bridget Courtney and the defendant Michael Keane remained in possession of the holding. Two receipts for rent were given in evidence, each was in the name of the "Representatives of Patrick Keane, deceased." The last of these two receipts was for the rent which fell due in November, 1891.

On the 23rd March, 1892, one Honor Donelan obtained a judgment in the Queen's Bench Division of the High Court of Justice against the defendant Michael Keane for £50 damages and £41 16*s.* 8*d.* costs. By an order of the Queen's Bench Division made in said action on the 13th September, 1892, upon reading an affidavit of the plaintiff, and after reciting *inter alia* that "it further appeared that the defendant was entitled to a beneficial interest as one of the next-of-kin of his father, the late Patrick Keane in the assets of the said Patrick Keane, who died in or about the month of November, 1864, intestate, leaving Bridget Courtney, otherwise Keane his widow, and Michael Keane his son the next-of-kin him surviving," the plaintiff in the present ejectment, Francis J. Mac Cormack, was appointed receiver, on behalf of the plaintiff, by way of equitable execution, of the beneficial interest of the defendant in the assets of the said Patrick Keane, as in said affidavit set forth, upon his entering into security, &c. On the 10th March, 1893, administration of the personal estate and effects of Patrick Keane was granted by the Probate and Matrimonial Division of the High Court of Justice in Ireland to the said Francis Mac Cormack.

The present action was an ejectment upon the title brought on the 14th April, 1893, in the Civil Bill Court of the county of Galway, by Francis J. Mac Cormack as administrator of Patrick

Keane, deceased, for recovery of the holding in Tyrgreenan. The civil-bill was dismissed with costs by the Recorder of Galway, and an appeal having been duly taken by the plaintiff from such dismiss came on for hearing before the Chief Baron at the Summer Assizes, 1893, for the county of Galway. *Fetherstonhaugh*, for the defendant Bridget Courtney, contended that the estate of the plaintiff, as administrator of Patrick Keane, was extinguished by the Statute of Limitations, and that therefore he could not recover. *Nolan*, *Q. C.*, for the plaintiff, argued, on the authority of *Mulhern* v. *Dorian* (1) that the plaintiff was not barred, and that he was entitled as administrator to recover possession of the entire holding; and that in any event he was entitled to recover the two undivided third shares of the farm of the defendant Michael Keane. There was no appearance for the defendant Michael Keane.

The learned Chief Baron stated:—" I was of opinion—1, that the plaintiff's estate, as administrator, was extinguished by the statute: *Rankin* v. *M'Murtry* (2); 2, that the effect of the statute was to vest the legal tenancy from year to year which was in Patrick Keane at the time of his death in the persons whose possession had caused the extinguishment of the estate of the administrator: and I held as a fact that the defendant Bridget Courtney was in possession of one undivided third in her own right, and of the other undivided two-thirds as bailiff of her son Michael Keane, and that therefore Michael Keane had under the statute acquired a title to two undivided thirds of the holding during the continuance of the tenancy from year to year; but, 3, that as Honor Donelan was not a plaintiff in the ejectment, and had not registered her judgment as a mortgage against the shares of Michael Keane, the plaintiff could not either as administrator, or as receiver, recover the two undivided shares in this action."

The order of the Recorder was therefore affirmed with costs subject to this case, liberty being given to the plaintiff to amend by stating that he was receiver, and suing as such, and also as administrator, the question for the opinion of the Court being:—

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(1) 17 Ir. L. T. R. 74.

(2) 24 L. R. Ir. 290.

Ought the learned Judge to have given a decree to the plaintiff, either as administrator of Patrick Keane, deceased, or as receiver appointed by the order of the 13th September, 1892, for the entire or any part of the holding which was the property of Patrick Keane, deceased, in his lifetime?

C. Mac Dermot (with him *Nolan, Q.C.*), for the plaintiff:—

On the death of Patrick Keane, intestate, in 1864, his widow Bridget Courtney must be taken to have entered into possession of the whole farm as executrix *de son tort*, and, but still in that character of executrix, to have entered into possession as to a two-third share of the farm as bailiff or trustee of the defendant Michael Keane, then an infant; she was thus a trustee of the estate of the intestate: *Quinton* v. *Frith* (1); *Mulhern* v. *Dorian* (2), and cases there cited. The mere arrival at age of Michael would not divest her possession of this character: *Wall* v. *Stanwick* (3); *Hobbs* v. *Wade* (4). Nothing has been done to change the character of her possession, as is shown by the form of the receipts for rent; and her position must still be that of an executrix, or executrix *de son tort*—see *Rayner* v. *Koehler* (5)—who cannot possibly deliver herself from the consequences of that position unless by handing over the property to the rightful representative: *Hill* v. *Curtis* (6).

[GIBSON, J.: Do you argue that there could be more than an implied trust?] Yes; the defendants were in the position of express trustees; the statute could not run as long as they were in possession, and paying rent, as "representatives of the deceased." [MADDEN, J.: If the facts had been differently stated it might well be open to you to argue that the statute was not a bar; but the Chief Baron has found as a fact that Bridget Courtney was in possession of part in her own right, and of part as bailiff of her son, and that he had so acquired a statutory title, thus altogether excluding the idea of any trust in relation to the estate of the deceased.]

There was not, nor could there be, any adverse possession in this case. Possession is never taken to be adverse if it can be referred to a lawful title: Shelford's Real Property Stat. (Ed. 1893), p. 117, citing *Wall* v. *Stanwick* (1); *Hobbs* v. *Wade* (2); and *Bolling* v. *Hobday* (3); and the defendant Bridget Courtney's possession must therefore be referred to an origin in an entry as executrix and as trustee. The Statute of Limitations, 3 & 4 Wm. 4, c. 27, does not apply to such a case. Its object was to settle the rights of persons adversely litigating with one another, not to deal with cases of trustee and *cestui que trust* where there is but a single interest: *Garrard* v. *Tuck* (4); followed and approved of in *Drummond* v. *Sant* (5). The statute could in the present case commence to run only from the date of the grant of administration to the plaintiff: *Rankin* v. *M'Murtry* (6). In *Molony* v. *Molony* (7) the testator's widow was taken to have entered for the purpose of carrying out the provisions of the testator's unproved will; and it was held that she could not rely on her possession to defeat the right of a person legally representing the estate of the testator. The present case is one of intestacy; but the principle is the same in both, namely, that such possession is a possession on behalf of the persons legally entitled.

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(1). Ir R. 2 Eq. 396.
(2) 17 Ir. L. T. R. 74.
(3) 34 C. D. 763.
(4) 36 C. D. 554, 557.
(5) L. R. 14 Eq. 262.
(6) L. R. 1 Eq. 90.

Fetherstonhaugh (*Serjeant Dodd*, with him), for the defendant Bridget Courtney:—

The plaintiff's remedy, whether as administrator or receiver, is barred by the statute. Under 3 & 4 Wm. 4, c. 27, s. 6, time begins to run, as against an administrator claiming a chattel real, from the date of intestate's death, not from the date of the grant of administration: *Davies* v. *Williams* (8).

This is not the case of a person entering into possession under a will to carry out its provisions, as in *Molony* v. *Molony* (7), nor a case involving the question how far the statute affects the position of a person in possession of lands of the deceased as bailiff or trustee for a child of the deceased, who, as in *Mulhern* v. *Dorian* (9), has taken out administration to the intestate and sues in that capacity, or who, as in *Quinton* v. *Frith* (1), being a legatee under a will, brings an action to recover the chattels real which had been bequeathed to him. The existence or non-existence of a fiduciary capacity as between Bridget Courtney and her son is here immaterial. The question is, was there any fiduciary relation between Bridget Courtney and the estate of the intestate? The case stated must be taken as finding that, in the opinion of the Chief Baron, the entry into possession of Bridget Courtney was in her own right and for the benefit of her son, and that she did not enter into possession in the character of an administratrix. If *Mulhern* v. *Dorian* (2) cannot be thus explained, it is inconsistent with *Rankin* v. *M'Murtry* (3), and must be taken to be so far overruled. Thus, after twelve years' possession from the date of Patrick Keane's death the right of a person to bring an action as his legal representative to recover possession of these lands was barred.

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(1) 34 C. D. 763.
(2) 36 C. D. 554, 557.
(3) 31 W. R. 9.
(4) 8 C. B. 231, 252.
(5) L. R. 6 Q. B. 763.
(6) 24 L. R. Ir. 290.
(7) [1894] 2 Ir. R. 1.
(8) 34 C. D. 558.
(9) 17 Ir. L. T. R. 74.

Nolan, Q.C., in reply.

[Counsel also referred to Williams' Executors (Ed. 1893), p. 1801; *Wych* v. *East India Co.* (4); *Lambert* v. *Browne* (5); *Harrington* v. *Bytham* (6); *M'Neill* v. *M'Laughlin* (7); *Holland* v. *Clark* (8); *Asher* v. *Whitlock* (9).]

O'BRIEN, J.:—

Many questions of difficulty have been discussed in this case, upon which it is not necessary for the Court to express any opinion. The Act of Parliament (27 & 28 Vict. c. 99, s. 35) provides for the stating of a special case by a Judge of Assize "for the opinion of a Superior Court of Common Law in Ireland, in case any question of law shall arise before him on the trial of any appeal which in his judgment may be proper to be decided by a Superior Court of Common Law." But this provision is confined strictly to authorizing the Divisional Court to give an opinion upon a question of law, not upon a question of fact, nor upon the question whether there is or is not evidence to sustain a finding of fact. The members of the Court are accordingly all agreed that our decision should be limited entirely by the restriction which the statute thus places upon the power thereby conferred on the Judge of Assize.

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(1) Ir. R. 2 Eq. 396.

(2) 17 Ir. L. T. R. 74.

(3) 24 L. R. Ir. 290. [See *Mulcaire* v. *Lane-Joynt*, 32 L. R. Ir. at pp. 694, 695.—REP.]

(4) 3 P. W. 309.

(5) Ir. R. 5 C. L. 218.

(6) 2 C. L. R. 1033.

(7) 12 L. R. Ir. 260.

(8) 1 Y. & C. C. C. 151, 170.

(9) L. R. 1 Q. B. 1.

The question here reserved is whether the learned Chief Baron should have granted a decree for all or any part of the land in regard to which this ejectment was brought by the plaintiff, who is a receiver by way of equitable execution appointed by this Court in the action of *Donelan* v. *Keane*.

The learned Chief Baron has found, as a matter of fact, and so specifically states, that, upon the death of the tenant from year to year of this farm, his widow entered into and remained in possession of the land; that "from the time of his death to the present time the defendant Bridget Courtney and the defendant Michael Keane remained in possession of the holding"; and "that she was in possession of one undivided third in her own right, and of the other undivided two-thirds as bailiff for her son Michael Keane, and that therefore Michael Keane had under the statute acquired a title to two undivided thirds of the holding during the continuance of the tenancy from year to year." We consider that we must base our decision wholly upon the finding of the Chief Baron as a matter of fact, and that this concludes the question altogether. The quality and character of the possession as found by him is inconsistent with any fiduciary character whatever such as would prevent the course of Statute of Limitations. The findings of the Chief Baron divest the case of all question. The widow Bridget Courtney is placed in exactly the same category as if she was a complete stranger to the estate of the intestate. Upon this ground we are all of opinion that the Statute of Limitations is a bar to the action, and that the Chief Baron was right in dismissing the case.

Johnson, Gibson, and Madden, JJ., concurred.

Solicitor for the plaintiff: *M'Cormack*.
Solicitor for the defendant: *Concannon*.

A. E. R. J.

Q. B. Div.
1893.
Nov. 23, 24.
1894.
Jan. 29.
Appeal.
May 14.
June 11.

THE QUEEN (AT THE PROSECUTION OF ELLEN MURPHY) v. RECORDER AND JUSTICES OF CORK (1).

Licensing Acts—Licensed premises—Title—Licensee in occupation of premises after cesser of his estate—Marriage settlement—Gift over to wife on bankruptcy of husband—Transfer of license to wife by husband after becoming bankrupt—Application by wife—6 Geo. 4, c. 81, s. 21—18 & 19 Vict. c. 114, s. 1.

By marriage settlement the lessee of certain premises settled them on himself for life, with remainder to his son for life, or till bankruptcy, with remainder to his son's then intended wife for life, for her separate use. After the death of the settlor the lessor gave a new lease of the premises to the settlor's son, who thereupon built a house on the premises. The son then became bankrupt, and on his bankruptcy his wife took proceedings in the Chancery Division, wherein she obtained a decree, declaring the new lease a graft upon the old one, and establishing her title to the premises. In each of the two years next following this decree the husband obtained, in his own name, a publican's license for the house he had built on the premises, but in the third year he indorsed on the licenses what purported to be a transfer thereof to his wife, and she applied at the General Annual Licensing Sessions for the county Cork for a transfer of the license. The Recorder and Justices refused this application, on the ground (1) that the husband had not, at the date of the transfer, any interest or property in the license capable of transfer, and (2) that if any such interest or property was vested in him, it should be transferred to his assignees. On a motion by the applicant to the Queen's Bench Division, and subsequently by appeal to the Court of Appeal, for a *mandamus* and *certiorari*:—

Held, by the Court of Appeal (affirming the decision of the Queen's Bench Division), that, as there had been neither the death of the person licensed, nor his removal from the licensed premises, nor the sale of or assignment of his interest therein by operation of law, or otherwise, after the license sought to be transferred was granted, the applicant was not entitled to claim the license by way of transfer within the provisions of the Licensing Acts.

Motion to make absolute, notwithstanding cause shown, a conditional order for writs of *mandamus* and *certiorari* directed to the Recorder and Justices of the county of Cork, in regard to an order made by them at the General Annual Licensing Sessions in October, 1893, whereby they refused the application of Ellen Murphy for the transfer of the retail license of certain premises in Coachford.

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(1) Before Sir P. O'Brien, C.J., and O'Brien, Holmes, and Madden, JJ.

The facts of the case and the arguments on which the application was grounded and resisted appear sufficiently from the judgments.

Ronan, Q.C., and *Daniel Mahony*, for the applicant.

Roche, Q.C., and *C. MacDermot*, for the Recorder and Justices of county of Cork.

Cur. adv. vult.

Sir P. O'Brien, C.J. :—

1894.
Jan. 29.

A motion was made to the Court in this matter for a writ of *mandamus*, and, if necessary, of *certiorari*, to compel the Recorder and Justices of the county of Cork to grant certificates to enable the prosecutrix, Ellen Murphy, to procure the transfer of a publican's license, which had been granted to her husband, Edmond D. Murphy. The case involved some questions of considerable general importance, and we reserved judgment that we might have an opportunity of carefully referring to authorities and statutes bearing upon the matters in dispute.

The facts appear to have been as follows:—By lease dated 20th August, 1857, certain premises at Coachford in the county of Cork were granted by Martha Lindsay to Denis E. Murphy, for the term of fifty-one years from the 25th March, 1857, at a rent of £61 14*s*. 8*d*. On the marriage of the lessee's son Edmond D. Murphy with the applicant Ellen Murphy, the premises so demised were put in settlement, and by a settlement executed on the 2nd May, 1874, the premises were limited to Denis Murphy the lessee for his life, with remainder to his son, Edmond D. Murphy, during his life, or until bankruptcy, with remainder to the applicant Ellen Murphy during her life for her separate use, with remainder to the children of the marriage, upon the usual trusts.

It appears that some time before the 15th May, 1879, Denis Murphy, the father, died; and upon that date a lease of the same premises was made by Martha Lindsay to Edmond D.

Murphy for the term of eighty-one years, at a rent of £62 14*s.* 8*d.* Some time after the execution of this lease Edmond D. Murphy, the lessee, built a house upon the premises. It appears that Edmond D. Murphy was adjudicated a bankrupt on the 21st December, 1891. After his bankruptcy a question arose as to whether the trusts of his marriage settlement were in accordance with the intention of the parties to it, and whether the lease of the 15th May, 1879, was a graft upon the lease of the 20th August, 1857, and subject to the trusts of the marriage settlement. A suit was accordingly instituted by Ellen Murphy, the present applicant and wife of Edmond Murphy, against the trustees of the settlement and the assignees in bankruptcy of her husband; and, by judgment of the Vice-Chancellor, dated the 30th November, 1892, the lease of the 15th May, 1879, was declared to be a graft upon the lease of the 20th August, 1857, and subject to the trusts of the settlement of the 2nd May, 1874; and the settlement itself was reformed so as to make it clear that the leasehold premises went over from husband to wife on the bankruptcy of the former.

It appears that Edmond D. Murphy got, in respect of the house which he had built on the leasehold premises, a publican's license in his own name for the year ending the 10th October, 1893, and a similar license for the year ending 10th October, 1894. Now, at the General Annual Licensing Sessions for the county of Cork in October last application was made on behalf of Ellen Murphy for a transfer of a publican's license from her husband Edmond D. Murphy to her. Proof was given of the facts I have stated, and also that what purported to be a transfer was indorsed on the several licenses from Edmond D. Murphy to his wife, and that the latter was in possession of the premises. The application was opposed by the Constabulary and by the assignees in bankruptcy of Edmond D. Murphy. The application is stated, in the affidavit which was made to ground the motion, to have been refused on two grounds: first, that Edmond D. Murphy had not in himself at the date of the alleged transfer to his wife any interest or property in the license capable of transfer by him; secondly, that if any such property was or is vested in the said Edmond D. Murphy the same should be transferred to his assignees in bankruptcy. Being of this opinion the learned Recorder ordered the license to be impounded.

Now by the present proceedings before us the decision of the Recorder is impugned, and the question for our consideration is: Was the decision of the learned Recorder well founded? I shall deal with the second point first, namely, that if Edmond Murphy had any interest, it should be transferred to the assignees. It will be observed that the Recorder expressed himself hypothetically: "if Edmond Murphy had any interest." He does not seem to have attached very much weight to this second ground of decision —it looks as if he expressed himself parenthetically. However, the hypothesis upon which this alleged second ground of decision proceeds is without legal foundation. The case of *Kelly* v. *Montague* (1) removes any doubt which the language used by some of the Judges in giving judgment in *Brennan* v. *Dorney* (2) may have caused, though indeed nothing could be more explicit than the statement of Lord Justice Barry in that case. He said in so many words, "I do not think there is any property at all in a license." However, the matter is set at rest by the case of *Kelly* v. *Montague* (1) in which it was decided that there is no property in a license apart from the ownership of the premises to which the license is attached. In this case, upon the bankruptcy of Edmond Murphy, the premises vested in his wife; therefore, upon the authority of the cases I have referred to, there was no interest in the license to vest in or be transferred to the assignees in bankruptcy.

The main ground of decision, however, was that first stated, namely, that Edmond Murphy had not in himself at the date of the alleged transfer to his wife any interest or property in the license capable of transfer by him. It was admitted by Edmond Murphy that the indorsement purporting to transfer the license to Ellen Murphy had only been signed by him immediately before the application was heard.

Now we have looked at this first ground from two points of view: 1, Were the licenses which were granted to Edmond Murphy, having regard to the fact that he had no interest in the premises when they

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(1) 29 L. R. Ir. 429.

(2) 21 L. R. Ir. 353.

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were granted, null and void? 2, Was the case within the Transfer Acts at all? Now, upon the first question, was the license purported to be transferred a nullity? No doubt it and the other renewal were obtained after the bankruptcy, and no doubt the premises had gone over at that time to the wife. This was, I think, the effect of the settlement, even before the decree of the Vice-Chancellor. But however this may be, after that decree, it must be taken as if it had borne its reformed character from its date. All estate and interest in the premises had gone away from the husband; he was in occupation as a mere licensee; no doubt his occupation was lawful, but estate interest or possession in a legal sense he had none. Is a license granted under such conditions valid or void? Mr. MacDermot's argument on this portion of the case was both careful and able. The point is one of considerable nicety and difficulty. FitzGibbon, L.J., in the case of the *Queen* v. *Recorder of Dublin* (1), says (at page 438):—"I hold it an essential condition to the grant of a license that the person to be licensed should be, *de facto* and *de jure*, upon receiving his license, entitled to the possession of the premises and ready to carry on business there, then, and thenceforward."

The language of the learned Lord Justice is "*de jure* entitled to the possession."

In giving judgment in the case of *Brennan* v. *Dorney* (2) the Vice-Chancellor said: "From this review of the statutes it appears to me to follow—first, that no right to the benefit of a publican's license can exist apart from the ownership and possession of the licensed premises; secondly, that the possession of the license itself by a person not entitled to such ownership or possession confers no right to either transfer or renewal of the license; thirdly, that the rightful possession of the licensed premises carries with it the right to the transfer or renewal, subject to the statutory requirements applicable to such cases." It will be seen, in the case of transfers and renewals, that, in the view of the Vice-Chancellor, "rightful possession of the premises" is an essential condition to transfer or renewal. FitzGibbon, L.J., in the case of *Kelly* v. *Montague* (3) adopted the propositions which, as I have stated, the Vice-

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(1) 16 L. R. Ir. 424. (2) 21 L. R. Ir. 353. (3) 29 L. R. Ir. 429.

Chancellor laid down in *Brennan* v. *Dorney* (1). Certainly, when the license now sought to be transferred was granted to Edmond Murphy, he cannot, in the strict legal sense, be held to have been in "rightful possession" of the premises; but at the same time I am not satisfied that the distinction between an interest entitling a person to possession and lawful occupation was present to the minds of FitzGibbon, L.J., or the Vice-Chancellor. In the case of the *Queen* v. *Recorder of Dublin* (2) the person who sought the transfer was not even in occupation, and the main ground of the distinction taken by the Court, between that case and *Clitheroe's Case* (3) was, that the house in respect of which the transfer was sought was not conducted as a public-house at all; and, in *Brennan* v. *Dorney* (1), the person who was in actual occupation was not in even as licensee from the owners. The Court of Appeal in that case did not, so far as I can understand, lay down any general principle, but based its decision upon certain equities which, it considered, arose out of an agreement that was entered into by the parties to the litigation. I am not myself, without further discussion, prepared to lay down that a license granted by the proper authorities to a person in lawful occupation of a house is a mere nullity—so much waste paper—and that he cannot be protected from penalty and punishment by a license so granted. Mr. Justice Wills said, in *Sharpe* v. *Wakefield* (4), "the license, though only to be exercised in respect of specified premises, is in all cases a personal one." It is true that it is to be exercised in respect of certain premises; but I am not prepared, as at present advised, to lay down that it is an essential condition to the validity of this personal license that the person who gets it should have a legal interest in, as distinguished from the lawful occupation of, the premises in respect of which this license is granted, or that, once the license is granted, we can on this ground review the action of the authorities whose action led to its being granted.

But was the case one within the Transfer Acts? A "transfer" was applied for, and under the head of transfer the case must be dealt with. The statutable provisions relative to this matter are the 6 Geo. 4, c. 81, s. 21, and the 18 & 19 Vict. c. 114, s. 1. In

(1) 21 L. R. Ir. 353.
(2) 16 L. R. Ir. 424.
(3) Ir. R. 11 C. L. 412.
(4) 21 Q. B. Div. 79.

my judgment, to warrant the magistrates at the General Licensing Sessions to deal with the case as one of "transfer" it must be of a character coming within these statutes. To come within the 21st section of the Act of Geo. 4, c. 81, there should be either the death of the person licensed, or his removal from the premises. The case of death does not arise, and it is not pretended that there was any removal. The husband is there still. It is only transferable to the wife on the death of the husband, and then if there was removal it is transferable only to the "assignee" or "assigns" of the person removing. Is the wife an assignee of the husband's interest? True the interest went over from the husband to the wife on his bankruptcy; but the measure of the interest taken was not the same, it went over for her life not for his; and it did not go over from him as assignor in the ordinary sense of the term; it went over in defeasance of his interest. But however this may be, since the licenses were granted to the husband nothing has gone over at all to the wife. I therefore cannot see how, since the license was granted, she in any way became her husband's assignee of the premises.

In like manner the case does not come within the 18 & 19 Vict. c. 114; since the license sought to be transferred was granted, there has been neither death, removal, sale, nor assignment by operation of law or otherwise of the husband's interest to the wife, within the meaning of the statute; and it was only on the morning of the application to the Quarter Sessions that the indorsement on the license was signed.

The Court of Appeal in *The Queen* v. *Recorder of Dublin* (1) has stated that the decision in *Clitheroe's Case* (2) is not to be extended; Lord Morris said that he would extend neither its policy, its logic, nor its principle. To hold that the license in this case was transferable would, in my opinion, be extending the doctrine of *Clitheroe's Case* (2). On the ground, therefore, that the application was for a "transfer," that the circumstances of the case did not bring it within the Transfer Acts, that the magistrates would not be justified in dealing with the case as "a transfer," and that to grant it would be an extension of the decision in *Clitheroe's Case.* (1), I think it should be refused and the conditional order discharged.

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(1) 16 L. R. Ir. 424.

(2) Ir. R. 11 C. L. 412.

O'Brien, J. :—

I agree in the conclusion which the Lord Chief Justice has stated, and with hardly any difference in my reasoning. It occurs to me that the ground that is stated by the Recorder and the Justices—the first of the two grounds stated by them—does not entirely express what in my view are the leading principles applicable to the case. They appear to have put the decision of the Court as to the first ground stated upon this, namely, that E. D. Murphy had no assignable or transmissible interest. I certainly should not be disposed to agree in this, nor for the purpose of my judgment am I to be taken as accepting that view.

Two considerations arise upon this. First of all the license in existence is a protection against violation of the law ; it is a lawful license in existence; but it might at the same time be such an interest lawfully existing in a person as might be incapable of transfer or assignment, if the law does require any positive act on the part of the holder to assign his interest. I leave this, however, out of consideration altogether.

The Act, 18 & 19 Vict. c. 114, which governs this question—which I think almost exclusively governs this question—appears to me to be confined to transfers at Petty Sessions of licenses, in cases of death, or removal, or the sale of or assignment of the previous holder's interest therein by operation of law or otherwise, and would not apply at all so as to give a right of transfer at the annual Licensing Sessions. The Act of 1855, which governs this question, makes the right to transfer to rest upon three conditions, death or removal (both of which events are out of this case), or the sale or assignment by operation of law or otherwise of the premises.

Now, when did the assignment by operation of law arise in the present case ? It arose upon one or other of two events ; upon the bankruptcy itself as carrying over the interest in the house, or upon the decree of the Vice-Chancellor, which declared that under the trusts of the marriage settlement the premises passed to the wife in consequence of the bankruptcy. Whichever of these events it was which produced the assignment it was an event which occurred before the license in existence in 1893 was granted. That was the real difficulty standing in the way of the success of the application; the event provided for by the statute having arisen before these last renewals had been granted at all. We cannot interpret the statute to mean that, where a person wrongfully in possession of a license keeps it on in his own name, after the right to it has shifted to another at a past period of time, the person in wrongful possession can be treated as entitled afterwards to assign the license to another.

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(1) Ir. R. 11 C. L. 412.

Of course the license, in general justice and substance, does continue from year to year, but in theory there is a distinct license granted each year for a distinct period of time, and the license for the preceding period must be taken to have expired; it follows necessarily from this that the event occurred before either of these last licenses or renewals were granted; and upon that ground alone it appears to me to be certain that the applicant is not entitled to succeed. The Justices do not always indeed take this strict view of the law, but we are here to deal with the application for writs of *certiorari* and *mandamus*, and these can only be granted where the Justices should in accordance with strict rules of law have granted the application in the first instance.

HOLMES, J.:—

I am not surprised that the Attorney-General has undertaken to uphold the conclusion arrived at in this case by the Recorder of Cork, as the question involved is of unusual importance in the administration of the Licensing law. My Lord has referred fully to the facts. There is no foundation for the allegation of fraud which I understand was relied upon at Sessions, and which, although not very strongly pressed here, has not been wholly abandoned.

Neither the husband nor the wife had anything to gain by the former continuing to hold the license after his bankruptcy; and I am unable to see how the assignees, who it is admitted cannot use the license for the benefit of the creditors, would be prejudiced if it were transferred to Mrs. Murphy. The course taken by the

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parties is explained, consistently with the good faith of all concerned, by the mistake made in drawing the settlement and by the pendency of the suit to have it reformed.

Until judgment in this action was given in 1892 it was not known whether the premises belonged to the wife or to the assignees; and it was natural that no objection was offered to the renewal of the license to the husband. Any effect which this has had on the rights of the wife must, in my opinion, depend upon considerations unconnected with her motive or object in acting as she did.

It is, I believe, now firmly settled as a cardinal principle of the licensing law that the holder of a license must have such an estate or interest in the licensed premises as entitles him to occupy them. The Vice-Chancellor in *Brennan* v. *Dorney* (1) gives a singularly clear and complete analysis of this branch of the law: and the first three of the four propositions with which he concludes have never, as far as I am aware, been questioned. It is there laid down that no right to the benefit of a publican's license can exist apart from the ownership and possession of the licensed premises, and that the rightful possession of the licensed premises carries with it the right of transfer or renewal, subject to the statutory requirements applicable to such cases. It seems to me to follow that if the estate or interest which entitles the publican to possession were to terminate either by assignment or otherwise, during the currency of the annual license, and if he were allowed to remain in the licensed house as permissive occupant, he would not be entitled to carry on the business. The license would still be valid and available for the protection of the assignee on his complying with the statutory conditions, but would cease to have any other operation.

I shall now take another case. I shall assume that such a permissive occupant as I have described obtains in the following October the ordinary certificate for renewal and an excise license for the ensuing year. What is the effect of these documents? Will they protect the licensee in trading as a publican as long as he is permitted to occupy the house, or are they absolutely invalid? I confess that I am reluctant to yield to Mr. MacDermot's invitation to accept the second alternative; but, upon reflection, I am obliged to admit that it is difficult to reconcile any other conclusion with the construction that the statutes on this subject have received. Once it is conceded that possession springing from ownership is a necessary condition to obtaining or holding a publican's license, it seems to follow that a license granted to anyone who does not fulfil the condition is void, unless there is involved in the granting of the license a decision by a competent tribunal that the person to whom it is given is qualified to receive it. Now, I think it is clear that as far as the excise license is concerned, the issue of it decides nothing of the kind. It is merely a ministerial act which the proper officer is obliged to do upon receiving the certificate of the Justices, and being tendered the amount of the duty. Have, then, the Justices jurisdiction to determine it before they give their certificate? If they have, it must be conferred upon them by the Legislature; and I have searched in vain for any statutory provision of this kind. The second and following sections of 3 & 4 Wm. 4, c. 68, show very clearly what are to be the subjects of inquiry by a Court of Quarter Sessions where an original license or a transfer is applied for. The 11th section of 17 & 18 Vict. c. 89 prescribes the duty of the Court of Petty Sessions when asked to grant a certificate of renewal. Nothing contained in these enactments imposes upon the Justices the duty of determining judicially whether the applicant has such an estate or interest in the premises as entitles him to occupy them. The prescribed notices do not refer to this point and give no information in reference to it. I am far from saying that the Court would not be justified in refusing the application if it appeared that the applicant had not the interest in the premises which the law requires; and I think that it would be prudent (at least in the case of original licenses and transfers) for it to have some proof of the existence of such interest, as otherwise it might be entering upon a useless investigation. In fact this is what the Recorder of Cork did, and, in my opinion, rightly did, in the case before us. But this is a wholly different thing from an adjudication by the Court upon a matter which it has jurisdiction to determine, as for example the good character of a publican seeking a renewal of his license.

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(1) 21 L. R. Ir. 353.

With every desire to come to a different conclusion, I can find no warrant, either in the licensing statutes or in the general law, for holding that the certificate of the Justices involves a declaration that the grantee of the license has a possessory interest in the licensed premises; and, if this be so, it suggests the conclusion that every license is given on the implied condition that it shall only operate if and so long as the licensee is entitled to such an interest.

The result of this train of reasoning would be that Mrs. Murphy was not entitled to have the house treated as previously licensed. The licenses obtained by her husband in 1892 and 1893 being void or inoperative, she could only have applied for a new license. I am, however, unwilling to decide the case on this ground, especially as it was developed for the first time in the course of Mr. Mac Dermot's able reply, and counsel for the applicant have had no opportunity of answering it. I therefore proceed to deal with another question, Was Mrs. Murphy, when her application came before the Recorder, a transferee within the meaning of the licensing code? I think that this can be considered quite irrespective of whether the licenses obtained by her husband were valid or not, and that it can be shown that her application was properly refused, even if it were held that the premises were theretofore duly licensed. The principal enactments relating to the transfer of a publican's license are 6 Geo. 4, c. 81, s. 21; 18 & 19 Vict. c. 114, and 37 & 38 Vict. c. 69, s. 12. These provisions enable the assignee of a licensed house to have the existing license transferred to him by an indorsement to be made thereon by the Justices at Petty Sessions. Such indorsement is an authority to the assignee to carry on the business until the Quarter Sessions to be held next after the expiration of one calendar month from the date thereof. The assignee may then procure at such Quarter Sessions as aforesaid a certificate to continue the temporary transfer until the holding of the Annual Licensing Quarter Sessions in the following October, at which he is obliged to obtain a further certificate before he can take out the Excise license for the ensuing year. I share my Lord's doubts as to whether Mrs. Murphy was at any time assignee of the premises within the meaning of this code; but, assuming that she became so when they vested in her on her husband's bankruptcy, she allowed the license then current to expire without making application to either Petty Sessions or Quarter Sessions. In October, 1892, her husband obtained a renewal; and, although she was assured shortly after by the decision of the Vice-Chancellor of her rights under the settlement, she took no step until a second renewal was given in October, 1893. How can she claim a transfer of this license? No change had taken place in her position since December, 1891. Was she at liberty to stand by while license after license was granted to a person having no interest in the premises, and to select her own time to put forward her claim as assignee? I am of opinion that she was not. Having allowed the license that was running when she became entitled to the premises to expire, her application could only have been for a new license. As such an applicant she would, no doubt, have had much to recommend her; but she claimed to have a transfer, and I am of opinion that the Recorder was bound to rule against her. I am not aware of any reported case precisely similar to this; but I think that the conclusion at which I have arrived is in accordance with principles that have been repeatedly recognized. *The Queen* v. *The Justices of Tipperary* (1) was probably decided upon the ground that a landlord who had evicted the tenant of a licensed house on the expiration of a lease was not an assignee; but I gather from the expressions of some of the Judges that, apart from this, they were of opinion that the fact of the landlord who had obtained possession of the premises in March not having applied for a certificate until the following October was a sufficient reason for holding that he ought not to be treated as a transferee.

The result is that in either aspect of the case—whether the licenses granted to Murphy in 1892 and 1893 were valid or invalid—Mrs. Murphy's application was rightly rejected by the Recorder. As far as she is concerned, I regret that the Court is obliged to come to this conclusion; she has lost a right less from carelessness than from ignorance; and if she had sought for a new license she would, in my opinion, have been a meritorious applicant. But almost every decision on the licensing

(1) 6 L. R. Ir. 133.

law has a wide application; and, if we were to hold that in the circumstances of this case, Mrs. Murphy was entitled to claim a transfer, we should establish a principle carrying with it far-reaching consequences.

A publican in this country enjoys a limited monopoly; and there is a natural desire to increase its value by collecting in a single ownership many licensed houses. The existing law, as it has been interpreted by judicial decision, is opposed to action of this kind. It will not allow the real owner of the business to place it under the control of a mere servant, and to allow him to obtain the license in his own name. At present there are probably from time to time successful evasions of this principle; but there would be nothing to prevent its systematic violation if the Court were to recognize the right of an assignee of a public-house, the license for which had been for years renewed in the name of his permissive occupant, to claim as transferee. For these reasons I concur in the judgment of the Court.

MADDEN, J.:—

The position of a person applying for a transfer of a publican's license under the Irish Statutes is more favourable than that of an applicant for a new license, inasmuch as certain inquiries, considered necessary for the protection of the public in the latter case, have been held inapplicable in the former. It is therefore the duty of the licensing authority carefully to examine the right and title of every person so applying, and if the applicant fails to bring his case within the statutory provisions regulating the rights to transfer, to refuse his application, leaving him, if so advised, to make out a case for a new license. This I understand to be the practical application of the principle laid down in several cases to the effect that the decision in *Clitheroe's Case* (1) ought not to be extended.

What, then, is the applicant's title in the present case? I will assume in her favour that on the bankruptcy of her husband in December, 1891, she filled the character of "assignee," and was as such entitled to apply for a transfer of the license granted to her husband. But although I make this assumption I must not

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(1) Ir. R. 11 C. L. 412.

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be taken as indicating as my opinion that this was her legal position. What are the next links in the chain of title? Two renewals made to her husband in 1892 and 1893, upon which she is compelled to rely in order to keep the license in existence. But when these renewals were granted to Edmond Murphy his estate in the licensed premises had determined. He was in occupation: whether as licensee, bailiff, or trustee of his wife, I need not inquire; for in none of these capacities would he have been legally entitled to obtain a renewal. I am clearly of opinion that the Recorder was bound to refuse to act upon renewals so obtained, and that he was right in holding that the applicant had failed to establish her right to claim under the statutory provisions relating to transfer of existing licenses.

It is altogether a different question whether the license, thus renewed, was, in the hands of Edmond Murphy, absolutely null and void. No doubt the statutory condition of obtaining or holding a license is the occupation (in the language of FitzGibbon, L.J.), *de facto et de jure*, of certain premises in respect of which it is granted. But when the licensing authority, under the mistaken belief that this condition has been satisfied, grants a license to a person in actual occupation, I am not prepared to hold, without further argument and consideration, that the license so granted is a nullity. A publican's license, though granted and used with regard to certain defined premises, does not lose its character of a personal license. I can find no provision in any of the Acts avoiding a license granted to a person in actual occupation of the licensed premises and claiming to be entitled thereto, in the event of such claim of title proving to be unfounded in law; while I do find an express enactment in the 90th section of the Licensing Act, 1872, declaring any license to be void if held by a person, or attached to premises, subject to statutory disqualification. In the view, however, which I concur with the other members of the Court in taking of this case, it is unnecessary to decide this point, inasmuch as the licenses improperly renewed, even if valid for the protection of Edmond Murphy, ought not now to be acted upon by the licensing authority for the purpose of entitling the applicant to claim a transfer as his assignee.

A. E. R. J.

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May 14.

Mrs. Murphy appealed to the Court of Appeal (WALKER, C., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

Ronan, Q.C., and *D. Mahony*, for the appellant.

Roche, Q.C., and *MacDermot*, for the respondents.

The arguments sufficiently appear from the judgments.

WALKER, C.:—

June 11.

The facts of this case are very simple: One Denis E. Murphy held premises in Coachford, under a lease from Martha Lindsay, dated the 20th August, 1857, for a term of 51 years, at a rent of £61 14*s*. 8*d*.

Edmond D. Murphy, a son of Denis, was in the year 1874 about to marry the prosecutrix, and by a settlement dated the 2nd May, 1874, Denis E. Murphy settled the premises on himself for life, with remainder to Edmond for life, or till bankruptcy, with remainder to Ellen Murphy for life for her separate use, with remainders over.

Denis E. Murphy died, and on the 15th May, 1879, Martha Lindsay made a new lease to Edmond D. Murphy for a term of 81 years, at a rent of £62 14*s*. 8*d*.

After this lease was made Edmond D. Murphy built a house on the lands, for which a publican's license was obtained.

Edmond D. Murphy was adjudicated a bankrupt on the 21st December, 1891.

An action was brought by Ellen Murphy in the Court of the Vice-Chancellor to have it declared that the new lease was a graft, and to establish her title consequent on her husband's bankruptcy, and also to have the settlement reformed. On the 30th November, 1892, the Vice-Chancellor gave judgment in favour of the settlement.

Edmond D. Murphy obtained the license in his own name for the year ending October, 1893, and also for the year ending October, 1894.

On the 15th September, 1893, Ellen Murphy served notice of an application for the 12th October for a certificate for a license, being a transfer of the license of Edmond D. Murphy for the same house.

The application was opposed by the bankrupt's assignees and by the constabulary. It appears that on the morning of the Sessions Edmond D. Murphy indorsed on the license a transfer to his wife. He had remained in possession of the premises. The Recorder and Justices refused the application, the grounds stated being—1, That Edmond D. Murphy had not in himself at the date of the transfer any interest or property in the license capable of transfer; and, 2, that if any interest or property was vested in him the same should be transferred to the assignees.

A conditional order for a *mandamus* to compel the granting of the certificate, and, if necessary, for a *certiorari* to quash the order of the Quarter Sessions was then obtained.

Two questions were argued, both here and in the Queen's Bench Division: one, and an extremely important one, was that the license to Edmond D. Murphy purporting to be indorsed was itself a nullity. In the view I take of the case it is unnecessary for me to express any opinion upon that point. There is much force in the argument of Mr. Ronan upon that branch of the case, and to hold the license a nullity would strike at the validity of a class of licenses, the granting of which is I believe a common practice.

It lay, however, upon the applicant, in order to bring herself within the particular head of the licensing law under which she was applying to show that she was a transferee within the transfer sections. The Acts relating to transfers contemplate (leaving out the case of death, which does not arise) the case of a person who gets by the act of the person removing from the premises an assignment of the interest of the licensed house followed by possession and occupation under it. I cannot find in this case either removal, or sale, or assignment. The question is not whether Ellen Murphy was in all events disqualified from getting a license, but whether she was entitled to claim it, with special privileges as a transferee.

The 6 Geo. 4, c. 81, and 18 & 19 Vict. c. 114, must receive their proper construction, and I cannot find any one of the cases there specified under which her application can range. It is true the premises had shifted in title to her on the bankruptcy of Murphy in November, 1891, but that was not a title passing by or through any act of his. The mere writing of his name on the paper did not make her transferee, nor the determination of her will under which he had lawfully occupied.

If the shifting clause had been in favour of a third person and not the wife, I do not see in what passed anything which would constitute Ellen Murphy a transferee within the meaning of the legislation. I do not think that either *Cox's Case* (1) or the case of *The Queen* (*O'Brien*) v. *Justices of Tipperary* (2) rule the present. In both there were features which do not exist in this. It would be an idle form to send the case back to the Justices, even if we were justified on an application for a *mandamus* to do so.

I think the appeal must be dismissed.

Palles, C.B. :—

In my opinion there is evidence that the possession of the house was changed from the husband to the wife and that in that sense there was a "removal" of the husband; but I think it clear that such removal was not a removal within the meaning of sect. 21 of 6 Geo. 4, c. 81, inasmuch as the appellant was not the assignee of her husband. Upon this point the authorities are uniform. Even Mr. Justice O'Brien (who differed from the majority of the Court in *The Queen* (*O'Brien*) v. *The Justices of Tipperary* (2) and was of opinion that in that case the applicant was entitled to a transfer), adopts this construction of the section. "The 21st section," he says, "of the 6 Geo. 4, c. 81, deals with two cases: 1st, the death of the licensed party; and, 2nd, with the case of his 'removal' from the licensed premises. It then provides for the indorsement of the license by the magistrates in favour of the executor, administrator, wife or child of the deceased licensed party (thereby referring to the first case), and in favour (in the second case) of the assignee or assigns of such person who shall be possessed of and occupy the licensed premises. That provision clearly restricts the construction to be put on the word 'removal' as used in the previous part of that section, and confines it to the case where the licensed party assigns his interest in the premises and leaves or removes from them accordingly."

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(1) 16 L. R. Ir. 424.

(2) 4 L. R. Ir. 259.

Neither is the case within sect. 1 of 18 & 19 Vict. c. 114, inasmuch as the application under that section must be made to Justices in Petty Sessions, and not as it was here, to the Quarter Sessions. The English decisions are not in point, as they were decided on 9 Geo. 4, c. 61, s. 14, which is wholly different from our 6 Geo. 4, c. 81, sect. 21.

Mr. Ronan argues that the Quarter Sessions ought to have entertained the application as for a new license and that as they did not do so the case ought to be now sent back to them to consider it in that light. The application to Quarter Sessions, however, was not only in terms for a license *by way of transfer*, but at the Quarter Sessions the application was argued solely on the ground that the applicant was entitled to a transfer, and this was done advisedly to obtain the benefit of the decision in *Clitheroe's Case* (1). The case was argued in the Queen's Bench upon the same sole ground; but even had the ground now urged been there relied on, it would have been out of the question to send the case back to the sessions to do that which the appellant strenuously contended the Court was not entitled to do.

I do not determine whether a person who duly obtained a transfer from Justices at Petty Sessions under 18 & 19 Vict. c. 114, or his assignee, is or is not entitled upon his application to the next Quarter Sessions to the benefit of the doctrine established by *Clitheroe's Case* (1).

I agree with the Lord Chancellor that the order appealed from should be affirmed.

FITZ GIBBON and BARRY, L.JJ., concurred.

Solicitor for the applicant: *Staunton.*

Solicitor for the Recorder and Justices of Cork: *Wright.*

G. Y. D.

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(1) Ir. R. 11 C. L. 412.

LOWRY *v.* DERHAM AND OTHERS (1).

Appeal.
1894.
June 22, 27.

Husband and wife—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *sect.* 1, *sub-sect.* 2, *sect.* 19*—Married Women's Property Act,* 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2*—Separate estate—Restraint on anticipation—Judgment for costs against married woman—Equitable execution—Receiver.*

The plaintiff was a married woman, with separate estate subject to a restraint on anticipation. An order was made in the form usual in such cases on October 31, 1893, dismissing the action with costs. A gale of the annuity to which the plaintiff was entitled, subject to the restraint on anticipation, fell due on May 1, 1894. On the same day a Judge in Chambers appointed one of the defendants receiver by way of equitable execution over this gale. The Queen's Bench Division refused to set aside this order; but on appeal:—

Held, by the Court of Appeal, that there was no power to make the order, and that it should be set aside.

Apart from the provisions of the Married Women's Property Act, 1893, a judgment against a married woman cannot be enforced against arrears of her separate estate accruing due subsequent to the date of the judgment, and subject to a restraint on anticipation.

Section 2 of the Married Women's Property Act, 1893, does not give power to the Court to alter or vary an order for payment of costs made before the Act came into operation, or to make a new order for payment of the same costs.

Appeal by the plaintiff from an order of the Queen's Bench Division, dated June 7th, 1894, refusing an application of the plaintiff that an order of May 1st, 1894, made by a Judge sitting in Chambers should be set aside. By the order of May 1st, 1894, Kelly, one of the defendants, was appointed receiver over a gale of an annuity payable to the plaintiff under the trusts of a settlement, dated October 12th, 1885.

The plaintiff, a married woman with property settled to her separate use, and subject to a restraint on anticipation under the terms of the settlement, instituted this action for damages against the defendants. On October 31st, 1893, the action was

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(1) Before Walker, C., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

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dismissed with costs, the said costs to be payable out of the plaintiff's separate property, not subject to any restriction against anticipation.

The costs of the action being unpaid on May 1st, 1894, the defendant Kelly applied *ex parte* that he might be appointed receiver over the gale of the plaintiff's annuity, which fell due that day under the terms of the said settlement. The Judge sitting to hear motions for the Queen's Bench granted the application. On June 7th following the plaintiff applied to the Divisional Court to rescind this order, and from the order then made refusing the plaintiff's application the present appeal was taken.

Lowry, for the appellant:—

The appointment of a receiver by way of equitable execution over the annuity, renders the restraint on anticipation inoperative, and is therefore contrary to section 19 of the Married Women's Property Act, 1882: *Robinson* v. *Pickering* (1). In no case, and by no device, can the restraint on anticipation be evaded: *Stanley* v. *Stanley* (2); *Pike* v. *Fitzgibbon* (3); *London and Provincial Bank* v. *Bogle* (4).

J. Murray, for the respondent:—

The receiver was not appointed over the annuity, but over the accrued gale, when it was in the nature of a debt due to the annuitant, or like money received to her use. The restraint on anticipation did not then exist as to that gale. It is a solecism to speak of anticipating a thing after it has happened: *Claydon* v. *Finch* (5); *Jollonds* v. *Burnett* (6). At the date of the order the gale was the property of the appellant absolutely, and therefore became available for payment of the costs of this action under the words of the concluding clause of sub-section 2 of section 1 of the Married Women's Property Act, 1882. The order is good against any arrears of the annuity due at the date of the order: *Hyde* v. *Hyde* (7); *Cox* v. *Bennett* (8).

(1) 16 Ch. D. 660.
(2) 7 Ch. D. 589.
(3) 17 Ch. D. 454.
(4) 7 Ch. D. 773.
(5) L. R. 15 Eq. 266.
(6) 3 De G. J. & Sm. 79.
(7) 13 P. D. 166.
(8) [1891] 1 Ch. 617, *per* Lindley, L.J., at pp. 622, 623.

This is a pending action within the meaning of the 2nd section of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 62): and the Court had power to make the order even against the gales that had not fallen due. The fact that the judgment was before the Act came into operation is immaterial: the Act is retrospective: *Fordham* v. *Claggett* (1); *Salt* v. *Cooper* (2); where it was held that so long as the final judgment in an action remains unsatisfied, the action is "pending" within the meaning of section 24, sub-section 7 of Judicature Act, 1873.

Cur. adv. vult.

June 25.

J. Murray referred the Court to *In re Lumley* (3); *Hood-Barrs* v. *Cathcart* (4); *In re Lumley* (5).

Walker, C.:—

June 27.

In this case it appears that Mrs. Lowry, the plaintiff, was entitled under a deed dated October 12th, 1885, to an annuity settled to her separate use, and subject to the usual restraint on anticipation. Judgment for costs was given against her in this action on October 31st, 1893. That judgment is in the form which has been in use ever since the decision in *Scott* v. *Morley* (6). It appears that on May 1, 1894, an order was obtained from a single Judge of the Queen's Bench Division, appointing one of the defendants receiver of a gale of Mrs. Lowry's annuity, which accrued due that day. On June 7th, 1894, counsel for the plaintiff applied to the Divisional Court to set aside this order, but this application was refused. This appeal has been taken from the decision of the Divisional Court.

Two points were argued before us—one apart from sect. 2 of the Married Women's Property Act of 1893, and the other on that section. 1. It was said that this gale of the annuity was an accrued interest, and that it had ceased to be subject to the restraint on anticipation. It is not necessary for us to go into that question, for it is set at rest by the authority of *In re Lumley* (3), before

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(1) 20 Ch. D. 637.

(2) 16 Ch. D. 544.

(3) W. N. 1894, p. 77.

(4) 10 *Times'* Rep. 541; since reported—[1894] 2 Q. B. 559.

(5) 10 *Times'* Rep. 544; since reported—[1894] 3 Ch. 135, 142.

(6) 20 Q. B. D. 120.

Appeal.
1894.

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Mr. Justice North, which was followed in the Court of Appeal in England in *Hood-Barrs* v. *Cathcart* (1). Mr. Justice North held that when an order was made against a married woman for payment of costs, the material date was the date of that order, and that a sequestration ought not to be issued to obtain income, subject to restraint on anticipation, falling due after that date. In *Hood-Barrs* v. *Cathcart* (1) Kay, L.J., says:—"In our opinion it was not intended by the Act of 1882 to enable a judgment against a married woman to be enforced against arrears of her separate estate accruing due afterwards, as to which she was restrained from anticipation, either by a receiver, sequestrator, charging order, or any kind of process." Thus it is plain that the first part of the respondent's argument is ruled by the decision of the English Court of Appeal.

2. But then it is said that the Married Women's Property Act of 1893 puts Mr. Murray's client in a better position. Section 2 of that Act says:—"In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party, out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver, and the sale of the property or otherwise as may be just." The effect of this section on the respondent's rights is ruled by the decision of the Court of Appeal in *In re Lumley* (2). Lord Justice Davey there points out that the section does not give jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make now a new order for the payment of the same costs. The order of May 1st, 1894, cannot give any new right not founded upon the judgment of October 31st, 1893. That judgment is limited on its face, and under the decision in *Hood-Barrs* v. *Cathcart* (1) can only apply to arrears of the annuity due at that date.

We have, therefore, two English decisions of very recent date exactly in point, and entirely consonant with the reason of the thing. The appeal must accordingly be allowed (1).

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(1) 10 *Times'* Rep. 441; since reported—[1894] 2 Q. B. 559.

(2) W. N., 1894, p. 77; since reported—[1894] 3 Ch. 142.

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Palles, C.B., Fitz Gibbon, and Barry, L.JJ., concurred.

Solicitor for the appellant: *Morgan.*
Solicitor for the defendant: *Larkin.*

G. Y. D.

EVANS, Tenant; PEYTON, Landlord (2).

Appeal.
1894.
June 29, 30.
July 26.

Agreement fixing a fair rent—Tenant for life—Inadequate rent fixed to the prejudice of remainderman and incumbrancer—Fraud—Purchaser of tenant's interest for value and without notice—Application to take agreement off the file—Jurisdiction.

T. L. P., who was tenant for life of certain lands in the county of Leitrim under a will, by which his life estate was determinable upon bankruptcy, or upon a receiver being appointed, entered into an agreement on the 1st March, 1888, with a tenant E. to fix a fair rent of his holding, which comprised 44a. 1r. 25p., at £6 a-year. The rent had previously been £23, and the agreement was filed in the Land Commission on the 11th June, 1888. In September, 1889, T. L. P.'s estate became forfeited, and the next tenant for life, J. L. P., became tenant for life in possession. On the 28th August, 1889, E.'s holding was sold by public auction, subject to the judicial rent of £6, and R. became the purchaser. On the 25th July, 1893, an application was made by J. L. P. and E. S. P., an annuitant, for liberty to intervene, and that the fair rent agreement might be taken off the file, and declared null and void. On the 7th November, 1893, an order was made by Mr. Commissioner FitzGerald, that the agreement should be removed from the file of the Court. R., the purchaser, was not represented on that application, owing to a miscarriage, and he subsequently applied to the Land Commission to vacate the order of the 7th November, 1893. On the 13th March, 1894, this application was refused, and R. appealed:—

Held, that, whatever might have been done in the case of the original parties, as between R. on the one hand, and J. L. P. and the annuitant on the other, the orders of Mr. Commissioner FitzGerald and of the Land Commission could not be sustained.

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(1) See remarks of Lindley, L.J., in *Pillers* v. *Edwards* (1894, W. N., at p. 212).—Rep.

(2) Before Walker, C., and Fitz Gibbon and Barry, L.JJ.

On the 1st March, 1888, Thomas Lawless Peyton, and the tenant Abraham Evans, entered into an agreement to fix a fair rent of the farm held by Evans as tenant from year to year, which comprised 44A. 1R. 25P. statute measure, at the rent of £23 1*s.* By this agreement the rent was fixed at £6, and the agreement and declaration were duly filed in the Land Commission on the 11th June, 1888. The lands formed portion of a property in the county of Leitrim, devised by the will of Charles R. Peyton, dated the 8th November, 1869, to several successive tenants for life, and the will contained a clause under which each life estate was liable to be determined in the event of the tenant for life becoming bankrupt or insolvent, or in the event of a receiver being appointed over his property (1).

The tenancy of Abraham Evans, having been created prior to the date of the will of Charles R. Peyton, bound the inheritance. In September, 1889, Thomas Lawless Peyton forfeited his life-estate, and Joseph Lewis Peyton, the next in succession, became tenant for life in possession. During the time that he was in possession Thomas Lawless Peyton had entered into a number of similar agreements to fix fair rents, whereby it was alleged that the rental was reduced from £1309 8*s.* 5*d.* to £346 15*s.*.

On the 28th August, 1889, Evans' holding was sold by public auction, subject to the judicial rent of £6, and was purchased by Francis Roden for £270. On the 25th July, 1893, an application was made by Joseph L. Peyton and Elizabeth Peyton, an incumbrancer, to the Land Commission for leave to intervene in the case, and that the agreement to fix a fair rent might be taken off the file and declared null and void, as having been fraudulently obtained, and this application was supported by evidence to show that the rent of £6 per annum was a gross undervalue. On the 7th November, 1893, an order was made by Mr. Commissioner FitzGerald that the agreement and declaration should be removed from the files of the Court. Roden, the purchaser, was not represented on the hearing of the motion owing to the illness of his solicitor, and on the 20th February, 1894, he applied to the Land Commission to have the order of the 7th November, 1893, vacated. Roden stated that he purchased the farm *bona fide*, and without any knowledge that the agreement under which it was held could be impeached. On the 13th March, 1894, an order was made by three Commissioners refusing this application. From that order Roden appealed.

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(1) The terms of this will are fully stated in *Peyton* v. *Gilmartin*, 28 L. R. Ir. 378.

Healy, in support of the appeal.

Matheson, *Q.C.*, and *J. H. Shaw*, for Joseph L. Peyton and Elizabeth Peyton.

Walker, C. :—

July 26.

This appeal raises an important question as to the effect of the making and filing of an agreement to fix a fair rent under the Act of 1881, and the jurisdiction of the Land Commission in respect of it.

On the 1st March, 1888, Thomas Lawless Peyton, and the tenant Abraham Evans, entered into an agreement to fix a fair rent of the lands in the tenancy of Evans. The holding contains 44a. 1r. 25p. statute measure, and was held at the rent of £23 1*s*. or £26, as variously stated. The lands formed part of a property in the county of Leitrim, devised by the will of Charles R. Peyton, dated the 8th November, 1869, to several successive tenants for life, and under the limitations of the will each life estate was determinable in the event of the tenant for life becoming bankrupt or insolvent, or amongst other matters a receiver being appointed over the lands for discharge of any judgment or other debt of the tenant for life, or in case by any other means whatever arising from his acts or debts, the annual rents of the lands or any part thereof could no longer be personally enjoyed by him.

Thomas L. Peyton had become tenant for life in possession by reason of the forfeiture of the estate of a preceding tenant for life. The tenancy of Abraham Evans bound the inheritance. The agreement of the 1st March, 1888, fixed the rent at £6, and the agreement and declaration were duly filed in the Land Commission on the 11th June, 1888.

Thomas L. Peyton, subsequently, in September, 1889, forfeited

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his life estate, and the next tenant for life, Joseph Lewis Peyton, then became tenant for life in possession.

It appears that during the time Thomas L. Peyton was in possession, he entered into a number of agreements to fix fair rents, and it is alleged that the rental was thereby reduced from £1309 8*s.* 5*d.* to £346 15*s.*

On the 28th August, 1889, the holding of Abraham Evans was sold by public auction subject to the judicial rent of £6, and Francis Roden became the purchaser for a sum of £270. On the 25th July, 1893, an application was made by Joseph Lewis Peyton and Elizabeth P. S. Peyton an incumbrancer, to the Land Commission, that the applicants, or one of them, might be at liberty to intervene in the case of Thomas L. Peyton and Abraham Evans, and that the fair rent agreement might be taken off the file and declared null and void, on the grounds that same was collusively and fraudulently entered into between the parties, and that the rent of £6 was far below the letting value, and was such as to endanger the security of the incumbrancer.

This notice was served on the purchaser Roden, and it having stood over till the 7th November, 1893, an order was then made by Mr. Commissioner FitzGerald, sitting alone, that the agreement and declaration should be removed from the file of the Court.

Francis Roden was not represented at the hearing of the motion, owing to a miscarriage, and on the 20th February, 1894, he applied to the Land Commissioners to have the order of the 7th November, 1893, vacated. This application was heard by three Commissioners, on the 13th March, 1894, and was refused with costs.

After the order of the 7th November, 1893, was made, rent was demanded from Roden at the old rate, in respect of which a sum of £84 was claimed, and it appears that an ejectment for non-payment of rent is pending to recover the possession of the lands. There was evidence by affidavit before Mr. Commissioner FitzGerald, when he made the order of the 7th November, 1893, that the rent of £6 was a gross undervalue, and I shall assume that there was quite sufficient evidence to establish that fact. This was the fraud alleged and proved, as well as the almost irresistible inference of collusion arising from the facts.

It was argued by Mr. Healy that the order of Mr. Commissioner FitzGerald was bad, as being made by a single Judge. We intimated during the argument that having regard to sects. 44 and 48 of the Act of 1881, this ground of appeal was unsustainable. It was also pressed that Francis Roden was a purchaser for value of the holding without notice of any fraud. This point has been disposed of in the judgment of Mr. Justice Bewley, and I concur in his reasoning.

The third ground of appeal remains, which raises a very important question. A judicial rent may be fixed either by an act of the Court, adversely, after hearing the parties, which act is subject to appeal, or under sub-sect. 6 of the 8th section. [His Lordship read the sub-section.] In both cases the judicial rent fixed continues for 15 years, and a statutory term, with all its incidents, is created. But as in the case of agreements, remaindermen or incumbrancers might be prejudiced by their terms, rules of Court have been framed to guard against such consequences. [His Lordship read rules 116–119.] It will be observed that the fraud consists in the amount of rent stated. It will be in many cases a question depending on disputable allegations as to whether there was undervalue or not. It is a question of degree in each case.

The fraud does not lie in the mode in which the agreement as a record was placed on the file. The signatures are genuine, and the forms complete and regular. The parties to the proceeding now are new—a new landlord and a purchaser from the tenant. What proceeding are they intervening in? It is at an end. I do not see any difference from the case of a rent fixed in *facie curiæ*, and I do not think it could be successfully contended that an order of the Court in such a case, fixing a fair rent, could be set aside on the ground that the witnesses for landlord and tenant fixed a rent so low, when the truth is known, as to make the inference of fraud irresistible.

The analogy of a decree obtained by fraud is against the application; an original action was necessary. It could not be got rid of by an interlocutory application in the action: *Flower* v. *Lloyd* (1), *Gilbert* v. *Endean* (2), *Emeris* v. *Woodward* (3).

It might be convenient that such a power should exist in the

(1) 6 Ch. Div. 297. (2) 9 Ch. Div. 259. (3) 43 Ch. Div. 185.

Land Commission; one's first impulse would be to say it does, and a proceeding to set aside the agreement was a natural one; but, on the other hand, the Court has only a statutory jurisdiction. If it can be exercised now, it can be at any time during the 15 years, and no matter what changes may occur in the relations of landlord and tenant.

I do not wish to be understood as deciding that between the original parties such a power could not be exercised; but the present case arises between the successors in title respectively of landlord and tenant, the latter being a purchaser; the question will arise in the action of ejectment for rent stated to be pending, in which apparently the whole matter can be litigated—but of course, I do not prejudge such a question.

Fitz Gibbon, L.J.:—

It must be most clearly understood that our judgment in this case does not, in any degree, question the jurisdiction of the Land Commission over its own orders and proceedings in any matter pending before it. I go farther, and disclaim any idea of questioning that jurisdiction, so long as it can be exercised over parties, or even against any one party, by whom the Land Commission has been induced to do any act in furtherance of a fraud. Any judicial or even ministerial act procured from a Court by fraud, "binds not such Court nor any other." "Fraud avoids all judicial acts." "In all cases alike, it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment" (and equally any judicial or ministerial act) "which can be clearly shown to have been obtained by fraud." These are universal principles of justice, and we do not question them. But they must be applied so as to do complete justice, and any Court which acts summarily upon them must see that it has the right parties before it, and that it is acting regularly and within its jurisdiction. There is a limitation which sometimes prevents an innocent party from proving in one Court that a judgment against him in another Court was obtained by fraud, namely, where it is in his power to apply directly to the Court which made the order, to vacate it. But this limitation cannot apply where the party defrauded was not a party to the proceeding in which the fraud was practised, nor where the undoing of that proceeding will not do complete justice. Both those objections seem to me to lie against the order appealed from here, and there is the further difficulty that, in my opinion, the Land Commission is *functus officio*, and had no jurisdiction to bring either of the present parties before it, nor to bind either of them on the application of the other.

We have to deal with a fraud which, assuming that it existed, was in the agreement between the former tenant and the then landlord, the former tenant for life. The filing of that agreement only gave to the fraudulent letting a certain statutory operation. Taking it off the file did not get rid of the agreement as between the parties to it: it only, by a side-wind, deprived it of its statutory effect. It appears to me that the application by the present owner to take this agreement off the file is rather analogous to asking the Stamp Office to cancel the stamp on a fraudulent bill of exchange, or on a fraudulent deed, so as to render it inadmissible in evidence; or it is still nearer, perhaps, to an application to the Registrar of Deeds to take the memorial of a deed, alleged to be fraudulent, off the registry, so as to deprive it of priority. Such illustrations show the partial nature of the relief given by such an order. Nevertheless, if the parties to the alleged fraud were still before the Land Commission, or if the proceeding upon the alleged fraud were still pending, I should not question the jurisdiction to investigate and decide the matter. I emphasize this, because it has been stated that there have been other cases which were in that position. It might even be enough if the tenant accused of the fraud were still before the Court. But that is not the position here. The moving party, the new landlord, claims to come in under Rule 51, which provides that "The Court, on the application of any person claiming to have an interest, may make an order giving him liberty *to intervene*, and thereupon he shall be deemed to be a party, and shall have *the same rights as regards the proceedings*, and shall be bound thereby in like manner, *as if he had been an original party*." That rule is, in my judgment, inapplicable to a proceeding that is over: I think it is inapplicable to a case in which the "intervenient" does not claim any interest or right under the proceedings, and does not seek to bind anyone, or to be himself bound, thereby, but

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wants to set them wholly aside as fraudulent, and to show that the agreement between other parties, on which the proceedings were based, is wholly fraudulent, and does not bind him at all. How can a stranger to the fraud "be deemed a party"? How can he have any "rights as regards the proceedings," or be in any way "bound thereby," "as if he had been an original party," when his case is that both the original parties conspired to commit a fraud upon him? His claim is for an entirely independent relief; his object is not to intervene or to continue the proceedings, or to obtain any "right as regards" them: he wants to treat them as void from beginning to end, though they have been completed; and if they are fraudulent, he is entitled to treat them as absolutely void, and to assert his own right and title as if they had never taken place. So much for the promovent. But the position of the other party raises a further difficulty: he claims to be a purchaser for value without notice. I don't say that such a defence can prevail; but can we summarily treat the party who puts it forward as if he was a party to a proved fraud? If there was fraud, it was in the nature of a conspiracy between the former tenant, the vendor, and the former tenant for life, to whose title that of the present landlord is paramount. Bewley, J., discussed the merits of the question as against the purchaser when he argued from his conduct, and from the way he paid his rent, that he must have known that something was wrong. He also discussed the law of the case with a view to show (and I by no means say that he was wrong) that Roden could not set up the defence of purchase for value without notice. I refer to these matters to illustrate the extreme inconvenience (if not danger) of exercising the same summary jurisdiction over new and honest parties, which might be most beneficially exercised in dealing with the parties to a fraud. *Stewart* v. *Aston* (1) was a case in which a Court of law left the party to his remedy in equity, because the alleged fraud did not altogether avoid the transaction at law. *E converso*, should not an independent party take an independent proceeding, where he is not bound by the transaction, if it be fraudulent, and the party against whom his right is to be asserted claims an equitable defence, and was not originally *particeps criminis?*

(1) 8 Ir. C. L. R. 35.

It is open to the present tenant for life to take any proceedings which he may be advised. If he considers that he is not bound by any tenancy he can sue on the title. If he admits that he is bound by the old tenancy, he can either sue for the old rent, or he can serve a notice to quit, if he thinks that there is no valid judicial tenancy; or he can bring an action to set aside the agreement in equity. That is all for him to consider, and in any case Roden will be in the position of a defendant, and can make the best of any defence upon which he desires to rely.

On the whole, it appears to me to be an unprecedented extension of the jurisdiction to set aside a judicial act on the ground of fraud, to apply it to a fraud alleged to have been committed by parties no longer before the Court—to apply it on the motion of a party claiming an independent or paramount right against a party who claims to have acquired a subsequent right—and to do all this where the jurisdiction of the Land Commission has already been completely exercised, and the proceeding alleged to be fraudulent has long since been ended. Besides, as I have already remarked, if the agreement be fraudulent, taking it off the file only deprives it of a specific statutory effect, and does not avoid it as an agreement; therefore this summary remedy is not complete.

Barry, L.J.:—

I agree, and I agree with great regret, because it is pitiable that, in the case of a small tenancy like this, a Chancery suit should be necessary to get rid of this fraudulent agreement—if it be fraudulent—between the former tenant for life and the tenant. Still, as between the new landlord coming in and the purchaser for value of the tenant's interest, I am not prepared to hold that the agreement can be taken off the file. Where is the thing to end? There must be finality somewhere or other; and that at any time a man who purchases a tenancy may be challenged in this manner as to things which took place before he became the purchaser is a proposition which I am not prepared to adopt, as we are asked to do here.

Solicitors for the landlord: *Whitney & Moore.*

Solicitor for the tenant: *E. J. M'Morrow.*

R. D. M.

Appeal.
1894.
Nov. 5.

ROULSTON, TENANT; CALDWELL AND CUST, LANDLORDS (1).

Land Law (Ireland) Act, 1881—*Present tenancy subsisting at the passing of the Act—Mortgage by owner in fee—Lease by mortgagor after the mortgage, but before* 1881, *without consent of mortgagee—Payment of rent by lessee to mortgagee—Recognition of lease by mortgagee.*

A. H., being seized in fee of lands in the county of D., mortgaged the lands in 1874 in fee to C. On the 30th October, 1880, W. H., the successor in title of A. H., made a lease of the lands to J. R. for ten years, at a rent of £131, the mortgagees not being parties to the lease, nor assenting to it. On the 1st November, 1884, the mortgagees gave notice to R. not to pay the rent due under the lease, or any future rent, to the landlord, and on the 18th April, 1885, they demanded payment from J. R. of the half-year's rent due on the 1st November previous, and also required the future rent to be paid to them. Some further correspondence passed between the mortgagees and J. R., in which the parties treated with each other on the basis that the lease was subsisting. On the 29th October, 1890, J. R. served a notice to fix a fair rent. The Land Commission, reversing the decision of the Sub-Commission, held that J. R. was not a present tenant at the passing of the Act of 1881:—

Held (reversing the decision of the Land Commission), that the mortgagees had shown an intention to deal with the lessee as holding under a lease, and that he was entitled to a present tenancy existing at the passing of the Act of 1881.

ALEXANDER HAMILTON, being seized in fee of the lands of Gortaquigley, in the county of Donegal, on the 8th December, 1874, mortgaged the lands in fee for £2500 to C. B. Caldwell and R. J. Cust. On the 30th October, 1880, William Hamilton, the successor in title of Alexander Hamilton, made a lease to Joseph Roulston for a term of ten years, at a yearly rent of £131. The mortgagees were not parties to the lease, nor did they consent to its being made. In 1884 the interest on the mortgage fell into arrear, and notice was served by the mortgagees on Roulston the tenant not to pay any further rent to the lessor. This notice was contained in a letter dated the 1st November, 1884, in the following terms:—"On behalf of our clients, Captain C. B. Caldwell and Mr. R. J. Cust, the mortgagees of the lands of Gortaquigley and Coolaghey, demised to you by an indenture of lease dated the 30th October, 1880, we hereby give you notice not to pay any rent now due, or which may hereafter become due by virtue of the said lease, without the authority and consent of the mortgagees."

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(1) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

On the 18th April, 1885, Cookson & Co., the English solicitors for the mortgagees, again wrote to Roulston: "Our clients, Messrs. C. B. Caldwell and R. J. Cust, the first mortgagees of Gortaquigley, have instructed us to request you to pay the half-year's rent which became due on the 1st November last to their agents, Messrs. Townshend & Co., of 15, Molesworth-st., Dublin, as soon as they apply to you for it, and also the future rent as it becomes due."

On the 21st April, 1885, Messrs. Townshend, the agents for the mortgagees, wrote to Roulston a letter, in the following terms:—"Referring to letter which you have doubtless received from Messrs. Cookson & Co., of Lincoln's Inn, London, we beg to apply for payment of £65 10*s*., half-year's rent of Gortaquigley and Coolaghey, payable under lease to you of 30th October, 1880."

On the 23rd April, 1885, Roulston wrote to Messrs. Townshend a letter:—"In pursuance of letter received from Messrs. Cookson & Co., and yours of the 21st inst, I beg to enclose my cheque for £62 18*s*., being the half-year's rent of Gortaquigley and Coolaghey, due 1st November last, less £2 12*s*. income-tax paid by me, for which I send the receipt."

In 1887 a proposal was made by the tenant to purchase his holding, and on the 5th May, 1887, Messrs. Townshend wrote to Roulston as follows:—

"The solicitors to owners were prepared to consider favourably your proposal as to purchase, but there is some difficulty in the way with the Land Commissioners, and inquiries are now being made as to granting you a longer lease, at a rent to be mutually agreed on. Some tenants paying us rents have asked the owners to have a fair rent ascertained by two valuers sent down by the Land Commission called 'Court valuers.' We don't know what

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the owners would say to this course, even if you approved of it;—this course saves costs of valuers and solicitors."

On the 24th April, 1889, Messrs. Townshend wrote to Roulston:—"We have heard from those interested in the lands of Gortaquigley, and we are instructed to say that, although they consider there is not the same necessity as there was last year for the allowance then given, they will be prepared if you wish a definite settlement made for the residue of the term to consider favourably an application to have the rent settled therefor at 15 per cent. under the rent reserved in your agreement, and also to give same allowance on rent due on its payment now."

Two other letters from the Messrs. Townshend to Roulston were proved, one dated the 29th March, 1892, in the following terms:—"Enclosed I send receipt, with thanks. What would you think of making an offer to buy under the Balfour Act? You might then, as you wish, avoid going into the Land Court."

The other was dated the 27th October, 1892—"Enclosed I send with thanks receipt for May rent. The owners had hoped long ago to let you know price at which they would sell, but have been much disappointed by the delay of a gentleman who promised to call on me many weeks ago, but has not done so. I do not see, however, how you suffer much by delay in fixing the judicial rent, which certainly has not been caused by the owners."

On the 29th October, 1890, Roulston served a notice on Caldwell and Cust to fix a fair rent, and on the 20th July, 1893, the Sub-Commission fixed a fair rent for the holding at £108. On appeal the Land Commission, by order dated the 9th June, 1894, reversed the decision of the Sub-Commission, and dismissed the originating notice, on the ground that the tenant was not a present tenant at the date of the passing of the Land Law Act, 1881. From that order the tenant appealed.

Campbell, *Q.C.*, and *Horner*, for the appellant:—

The mortgagees may adopt and ratify the act of the mortgagor in granting the lease. The tenancy was a "present tenancy," subsisting at the time of the passing of the Act of 1881, because the mortgagees by not ejecting the tenant, but by notifying him to pay the arrears of rent due, and to become due, under the lease, and by accepting the rent from him, adopted and continued the lease with all its incidents: *Brown* v. *Storey* (1); *Evans* v. *Elliot* (2); and *Pope* v. *Biggs* (3), were all cases in which the mortgagees had not actually adopted the existing tenancy. [They also referred to Fisher on Mortgages, p. 415, and Woodfall on Landlord and Tenant, pp. 59 and 233.]

Ross, Q.C., and *A. Todd*, for the respondents:—

The tenancy must be one "subsisting" at the passing of the Act of 1881, *i.e.* the 22nd August, 1881, or "created" before the 1st January, 1883. The tenancy now existing between the mortgagees and the tenant was not subsisting at the time of the passing of the Act. The lease was the tenancy then subsisting, and the reversion on this lease has not been conveyed by the mortgagor to the morgagees. Unless the mortgagor could be held to be the mortgagee's agent in making the lease, the lease cannot bind the mortgagee: *O'Loughlin* v. *Fitzgerald* (4); *Cuthbertson* v. *Irving* (5); *O'Rourke's Estate* (6). There is no evidence of this. The tenancy now subsisting with the mortgagees is a new tenancy created in 1885 by payment of rent by the tenant to the mortgagees.

Even if the tenant and the mortgagees agreed that the tenancy should date back to the passing of the Act of 1881, that would not make it a present tenancy. The parties cannot bring themselves within the Act, and within the jurisdiction of the Land Commission by agreement: *Hughes* v. *Bucknell* (7); *Prior* v. *Omley* (8); *Wakefield* v. *Hendron* (9); *Sparrow* v. *Hepenstall* (10); *Corbett* v. *Plowden* (11); *Johnson* v. *Jones* (12); *Howell* v. *Briscoe* (13).

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(1) 1 M. & G. 117.
(2) 9 A & E. 342.
(3) 9 B. & C. 245.
(4) Ir. R. 7 Eq. 483.
(5) 4 H. & N. 742.
(6) 23 L. R. Ir. 497.
(7) 8 C. & P. 566.
(8) 10 C. B. 25, 32.
(9) 11 L. R. Ir. 505, 510.
(10) 24 Ir. L. T. R. 65.
(11) 25 Ch. Div. 678.
(12) 9 A. & E. 809.
(13) 21 Ir. L. T. R. 73.

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1894.

ROULSTON, *Tenant;* **CALDWELL,** *Landlord.*

WALKER, C.:—

This case involves no dispute as to the facts. Alexander Hamilton, who was seized in fee of the lands in question, by deed dated the 8th December, 1874, mortgaged them to Caldwell and Cust, the respondents in fee. The equity of redemption subsequently vested in William Hamilton, and on the 30th October, 1880, he being left in undisturbed possession and apparent ownership of the lands, made a lease to Joseph Roulston, the present appellant. By this lease William Hamilton demised to Roulston the lands in question, to hold for a term of ten years from the 1st November, 1880, at the yearly rent of £131, the first half-year's rent to be paid on the 1st May, 1881, and the second on the 1st November, 1881. This lease contained the usual clauses in leases between landlord and tenant and covenants against assigning and subletting and a clause prohibiting all claim for disturbance or improvements under the Act of 1870, or any Act amending the same, also a clause of re-entry for breach of covenants. On the 1st November, 1884, the solicitors for Caldwell and Cust, the mortgagees, wrote to Roulston as follows: [His Lordship read the correspondence, *ante*, pp. 137, 138.] I read those letters as equivalent to an arrangement between the now respondents and Roulston, that he should for all purposes become their tenant, with all the rights and liabilities which the contract of tenancy created, and all the incidents attached to the subsisting tenancy, and for ten years the parties have acted on that basis. One of the incidents as between Hamilton and Roulston was a right to fix a fair rent at the expiration of his lease on the 1st November, 1890. This valuable incident depended on the date of the commencement of the tenancy and its expiration. It would have become an immediate right when the Act of 1887 passed.

The originating notice is dated the 29th October, 1890, and was served almost contemporaneously with the expiration of the period of ten years fixed by the lease of 1880. The Sub-Commission fixed a fair rent, but the case was dismissed by the Head Commission, on the ground that a new tenancy had been created after the 1st January, 1883, and that no present tenancy existed in respect of which a fair rent could be fixed. The lease was in any event at an end long before the case was heard by the Sub-Commission. I think that the case of *Evans* v. *Elliot* (1), adopted in *Towerson* v. *Jackson* (2) establishes that, to create the relation of landlord and tenant between a mortgagee and the tenant of the mortgagor, express contract is necessary and not merely the service of a notice to pay rent, and payment after by the tenant.

I also consider that the case of *Gladman* v. *Plumer* (3), is an authority that direct express contract may carry back the relation of landlord and tenant to any agreed time. I infer from the documents here and the acts of the parties an express contract that Roulston shall be tenant to the mortgagees for all the purposes and on all the terms of the lease with all its incidents. Roulston had a present tenancy subsisting at the passing of the Act of 1881, and he was in possession and occupation under it. There was therefore an existing *status*. I think it was competent to adopt it, and it was adopted for the highest considerations. In a country circumstanced like ours it would be a serious proposition if this were impossible. I do not think the tenancy is one "created" within the meaning of *Howell* v. *Briscoe* (4).

Upon the whole, I think that the law of the case can be reconciled with its justice, and the acts and intentions of the parties, and therefore that the decision of the Land Commission should be reversed and the case remitted to fix a fair rent.

Fitz Gibbon, L.J. —

There is a proposition of fact, which must be stated in the clearest terms, in order to understand the basis of our decision in this case, and it is this:—In all their dealings with the holding in question, the mortgagees and the tenant regarded and treated the holding as one to which the Land Acts, 1881 and 1887, applied, and the tenancy as "a present tenancy," as defined by those Acts. It is impossible to find any ambiguity upon that point in the evidence. There is express reference, again and again, to the tenancy as one within the Acts, and there is express reference to the tenure under the lease; lastly, the deduction of the rates was settled in favour of the mortgagees, on their own requisition, upon the basis of the continuance of the lease, and they insisted upon a payment to which they would not have been entitled, if they were not landlords bound by the lease. Therefore there was even a contract, and consideration paid, for the continuance of the old tenancy. We start with that fact. The question is—Was it legally possible for mortgagees, who intended, and wished, and contracted to do so, to give or recognize the *status* of a "present tenancy" under the circumstances which exist here? We must bring the case within the first clause of the definition of "present tenancy," viz. "'Present tenancy' means a tenancy subsisting at the time of the passing of this Act." The second clause of the definition was temporary, and intended to prevent the exclusion of tenancies created within a short time after the Act, and it does not apply here. We must hold, if the appellant is to succeed, that his tenancy was "subsisting" at the date of the passing of the Act: in other words, that it is the tenancy under the lease. I am bound to admit that that tenancy, so long as the mortgagees did nothing, was absolutely void against them. But in November, 1884, the mortgagees intervened by serving notice on the tenant not to pay any further rent under the lease, without their consent. They followed that up in April, 1885, by specifically demanding payment to themselves of the entire gale of the rent, which had been running under the lease, since the 1st November previously. That gale was afterwards paid to them, and so were subsequent gales, after a correspondence based upon the continued subsistence of the lease, or at least upon a tenancy having all the incidents of the leasehold tenancy.

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(1) 9 A. & E. 342.

(2) [1891] 2 Q. B. 484.

(3) 15 L. J., Q. B. (N. S.) 79.

(4) 21 Ir. L. T. R. 73.

The question, in my mind, is between a recognition, ratification, or continuance of the old tenancy, and the creation of a new one that did not subsist before. It appears to me that after the mortgagees, in May, 1885, took the whole gale of rent which had accrued and been due from the previous November, they cannot deny that the relation of landlord and tenant subsisted between them and the tenant, at least from November, 1884, though they certainly did not make any contract with him until May, 1885. Therefore the tenancy may be carried back for at least six months, and if so, why not back to the Act of 1881? What was the commencement of the tenancy Can it

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have commenced before the relation of landlord was assumed by the mortgagees? I think we are helped to an answer by reference to another Act of Parliament, the Notice to Quit Act. If it had been not a lease, but a tenancy from year to year, which had begun originally on May 1st, it has been admitted by Mr. Ross that the receipt of rent by the mortgagor from November 1st would not entitle him to give a six months' notice to quit, expiring on that day, and there is clear authority that, where nothing else takes place, a tenancy under such circumstances would be determinable by a notice to quit expiring on May 1st. That has been put, on the ground that it is an incident of the old tenancy, which attaches to the new landlord. But under the Notice to Quit Act, the sufficiency of a six months' notice to quit depends on "the period of the year *when such tenancy commenced.*" It appears to me to be a strong argument in support of the appellant that, for the purposes of the Notice to Quit Act, a tenancy from year to year, as against a mortgagee who has entered into receipt of the rents, is still treated as "commencing" on the day when the mortgagor created it, and not on the day when the mortgagee recognised it, or first entered into receipt of the rent under it. I think that in the Land Acts the words "subsisting at the passing of the Act" may receive a similar interpretation, under like circumstances, and all that we have to see is that such an effect is *legally possible.*

There is another principle which I think we may apply to the case. First, I take the case of a lease by a mortgagor prior to the mortgage. There the tenant *attorns* to the mortgagee; the old contract of tenancy is not put an end to; there is a novation as it were, for another person steps into the place of the original landlord, and into the reception of the rents, and into the enjoyment of the rights of one of the contracting parties. Why can we not apply that principle to a lease subsequent to the mortgage, if the mortgagee and tenant so agree? No doubt the mortgagee is not bound by the tenancy at all, unless or until he chooses to adopt the lease. But even *Pope* v. *Biggs* (1) says: "The mortgagor may be considered as acting in the nature of a bailiff, or agent, for the mortgagee," and why can there not be an adoption and ratification of this contract made by the bailiff or agent, just as a principal can adopt any other contract, and can make it binding on himself from its original date? These are perhaps refined arguments, but they are in furtherance of the proved intention of the parties in this case, and we ought to give effect, if we can, to their understanding that the Land Act was to apply.

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(1) 9 B. & C. 245.

But there is still the further ground that the mortgagees took over the tenancy with certain incidents, and that one of those incidents was understood to be that it was "a present tenancy" within the meaning of the Land Acts. Even if we treat it as a tenancy from year to year only, as against the mortgagees, it was still a tenancy on the terms of the old lease, so far as its termination was concerned, for it is settled law that upon the expiration of the term of the lease, the mortgagees could demand possession without notice to quit. If the termination of the old tenancy survives as an incident, I cannot see any greater difficulty in treating the tenancy as one "subsisting" from the date of the original letting—as "a present tenancy"—for the purposes and within the meaning of the Land Acts.

The cases referred to only show that the receipt of rent by a mortgagee from a lessee does not *necessarily* set up the lease. Of course it does not; if the mortgagee does nothing more, the receipt of rent is only evidence of a tenancy from year to year. But here the mortgagees have done more: they have recognized —taken over—adopted—a tenancy previously subsisting—a "present tenancy," and I hold that there is no law to prevent them from doing so.

BARRY, L.J.:—

After the elaborate judgments of the Lord Chancellor, and of FitzGibbon, L.J., I do not propose to go through the facts in detail. There are two propositions in the case, one of fact and one of law. The proposition of fact to be determined is, what is the contract between the mortgagee who has gone into possession and the tenant previously in possession under a letting made by the mortgagor? That question does not depend here on

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the mere acceptance of rent. I am of opinion that it is satisfactorily made out by the correspondence and the acts of the parties that, as a matter of fact, the mortgagees and the tenant contracted that the tenancy taken over was to be for all intents and purposes a tenancy within the Land Act.

That being the question of fact, is there anything in law to prevent such a contract being made between the parties? I am of opinion that there is not. If being entered into, it was void, it would be a most appalling event in respect of the operation of the Act of Parliament. Taking into account the condition of this country, where the land is honeycombed with mortgages, I think that where a mortgagee finds a tenant in possession, and is willing to deal with him as a present tenant, it is impossible that it was the intention of the Legislature that such a tenant is to be excluded from the benefits of the Act. The consequences of such a result would be disastrous. We have sufficient in this case to warrant us in holding that a consequence so repugnant to the intention and contract of the parties themselves, and to the spirit and intention of the Act of Parliament, should not be adopted.

I agree that the appeal should be allowed.

Solicitor for the tenant: *David Wilson.*

Solicitor for Messrs. Caldwell and Cust: *William Wilson.*

R. D. M.

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1894.
June 21, 22.

YEATES *v.* CARUTH (1).

(1893. No. 6249.)

Arbitration—Consent to refer—Two arbitrators chosen and named by both parties—Common Law Procedure Act, 1856, *ss.* 15, 16.

The parties to an action consented to refer all matters in dispute to the arbitration of A and B, with power to call in an umpire. B declined to act:—

***Held* (affirming the decision of Andrews, J.), that the Court had no power to appoint an arbitrator in place of B.**

Appeal from the order of Mr. Justice Andrews, sitting for the Exchequer Division, dated the 16th May, 1894, refusing to appoint an arbitrator in the stead of Humphrey Barron, who had declined to act as such under the consent entered into in the action.

The material portion of the consent is set out *verbatim* in the judgment of the Lord Chancellor.

Craig, Q.C. (with him, *Chambers*), for the appellant:—

The proper construction of section 15 of the Common Law Procedure Act, 1856, is that if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the submission does not provide that the vacancy is not to be supplied, in the event of the parties failing to concur in appointing a new arbitrator, then, after service of the prescribed notice, the Court is to have power to appoint a new arbitrator. Here Barron was appointed arbitrator; he has refused to act: there is no stipulation preventing the appointment of a new arbitrator; the prescribed notice was served; all the conditions required by the section are fulfilled, and the Court has therefore power to appoint a new arbitrator. The analogy of the provisions of section 5 of the

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(1) Before Walker, C., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

Arbitration Act, 1889 (52 & 53 Vict. c. 49), is in favour of this view. [They cited *Gumm* v. *Hallett* (1)].

Gordon, Q.C., and *Bartley*, for the respondent:—

In section 15 of the Common Law Procedure Act, 1856, the words "if any appointed arbitrator refuse to act" must mean "if any *single* arbitrator when appointed refuse to act"; the words "such document" prove conclusively that the second clause of the sentence deals only with a case where a single arbitrator has been appointed. These words incorporate by reference the document mentioned in the preceding clause, that is, a document which "provides that the reference is to be to a single arbitrator." When the section refers to a document referring the case to two arbitrators it speaks not of "such document" but of "the document authorizing the reference." If the appellant is right the case provided for by section 16 would also fall within section 15, and the remedies provided by the two sections are inconsistent. There is no other section under which it can be contended that an arbitrator can be appointed to supply Barron's place: *In re Smith & Service and Nelson & Sons* (2).

Further, this is an agreement to submit to two specified arbitrators: it contains no general clause consenting to submit to arbitration. If either of the two arbitrators refuse to act, the case falls altogether outside the Common Law Procedure Acts: *Randell* v. *Thompson* (3); *Moffatt* v. *Cornelius* (4). There is a great difference between an agreement to refer in general and a submission to a particular arbitrator or arbitrators: *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe* (5).

Walker, C.:—

June 22.

We are all of opinion that the decision of Mr. Justice Andrews is right.

The consent made between the parties is in the following terms:—"It is hereby consented and agreed by and between said parties testified by the said respective parties signing this consent that the matters in dispute in this action shall be referred to the arbitration and award of James Wood of, &c., and Humphrey Barron of, &c., with power to the said arbitrators to call in an umpire in case of their disagreement." It is therefore a consent to refer the matters in dispute to two specified arbitrators chosen and appointed by both parties; and the case comes before us on the difficulty created by Barron refusing to act as such arbitrator.

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(1) L. R. 14 Eq. 555.
(2) 25 Q. B. Div. 545.
(3) 1 Q. B. Div. 748.
(4) 39 L. T. (N. S.) 102.
(8) 20 Q. B. Div. 177.

It is not necessary to give any opinion on one point argued by Mr. Bartley, viz. the question whether the case is one to which the Common Law Procedure Acts do not apply.

At common law this consent falls to the ground, and unless the statute law enables it to be worked out neither party can avail themselves of its provisions. It is clear the case does not come within section 16 of the Common Law Procedure Act of 1856, because though the consent was to refer the matters in dispute to two arbitrators, the arbitrators here are not such as are mentioned in that section, viz. "one appointed by each party." Does the case fall within section 15 of the same Act? "If in any case of arbitration the document authorising the reference provide that the reference shall be to a single arbitrator, and all parties do not after differences have arisen concur in the appointment of an arbitrator." So far the clause deals only with a case where no arbitrator has been appointed, but it next proceeds to deal with cases where there has been an arbitrator appointed. "Or if any *appointed* arbitrator refuse to act or become incapable of acting, or die, and the terms of *such document* do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one." This is the branch of the section which is said by the appellant to include the present case. However, I cannot so read it. The words "such document" give us the key to the true construction of the sentence; these words must refer to "the document authorising the reference" in the first branch of the clause, and that document is a document authorising a reference to a single arbitrator. So far, therefore, the section only deals with cases where there is a single arbitrator to be appointed, or a single arbitrator actually appointed. The section next proceeds to specify another set of

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circumstances in which the powers it confers may be exercised, namely, when a third arbitrator or umpire is to be appointed, or having been appointed, fails or becomes incapable to act. These circumstances of course do not include the present case, but neither do they include the case of a single arbitrator originally appointed; and it is instructive to observe that when in this branch of the clause the submission is mentioned, it is not spoken of as "such document," a description which would refer back to the first case, *i.e.* that of a single arbitrator, but it is described as "the document authorising the reference." The remaining portion of the section prescribes the remedy for any of the failures mentioned in the earlier clauses, by directing that in every such instance the Court or a Judge thereof is to appoint some one to act as such arbitrator, umpire, or third arbitrator, respectively. The remedy prescribed by section 16 is different in cases where it is applicable. Where that section applies the party not in default may appoint his arbitrator to be sole arbitrator. The difference existing between the two remedies appointed by the two sections affords further confirmation for the view which I have taken. For, if Mr. Craig's argument were correct, a case which fell within section 16 would also come within section 15, and we should have the strange anomaly that the remedies provided by each section for the same set of circumstances were altogether dissimilar.

I am of opinion, therefore, that the case is not provided for, and we find ourselves landed in the same difficulty as the Court was in *In re Smith & Service and Nelson & Sons* (1), where there was discovered a somewhat similar *casus omissus* in the Arbitration Act of 1889.

Palles, C. B.:—

I concur in holding that the order of Andrews, J., was right. In my opinion "such document" in the commencement of section 15 means the document previously mentioned in the section, viz. a document authorising a reference and providing that such reference should be to a single arbitrator. I arrive at this conclusion for two reasons:—1, because in the third limb of the section, which refers to a case of two arbitrators, and therefore

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(1) 25 Q. B. Div 545.

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cannot be under such a document as is first mentioned in the section, the document is referred to not as "such document," but as the "document authorising the reference." 2, Were Mr. Craig's contention right a reference to two arbitrators, one of whom was appointed by each party, and one of whom refused to act, would be within section 15, as well as within section 16. The remedies given by those sections are wholly different. Under section 15 the appointment of the new arbitrator should be made by the Court. On the other hand, under section 16 the arbitrator who remains willing to act may be appointed sole arbitrator by the party who originally appointed him. I do not think that it was intended that any one party should have these two different rights.

FITZ GIBBON and BARRY, L.JJ., concurred.

Solicitor for the plaintiff: *Mulligan.*
Solicitors for the defendant: *Thompson & Ross.*

G. Y. D.

Appeal. 1894.

Nov. 5, 6.

LANYON, LANDLORD; CLINTON AND KERNOGHAN, TENANTS (1).

Landlord and tenant—Fair rent—Fine—Fee-farm grant set aside—Land Law (Ireland) Act, 1887, *s.* 2—*Land Law (Ireland) Act*, 1881, *s.* 8.

The Land Commission had, under sect. 2 of the Land Law (Ireland) Act, 1887, set aside two fee-farm grants, on the ground that the acceptance thereof was procured by threat of eviction. The grantees had paid fines to the landlord in order to obtain the fee-farm grants. After the fee-farm grants had been set aside, the tenants served notices to fix fair rents of their holdings:—

Held, that in fixing the fair rents of the holdings it was competent for the Land Commission to have regard to the fines paid by the tenants for the fee-farm grants.

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(1) Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZGIBBON, L.J.

Appeal.
1894.

LANYON,
Landlord;
CLINTON,
Tenant.

APPEAL on a case stated by the Irish Land Commission for the consideration of the Court of Appeal.

The case stated was as follows:—"The above tenants' holdings had originally formed portion of the Mountcashel Estate, of which Sir Charles Lanyon became the purchaser in the Landed Estates Court, and at that time nearly the whole of the Mountcashel Estate was held by leases for years, which expired on the 1st November, 1875. Both these tenants were in occupation under such leases at the date of their expiration, and we refer to the said leases. Clinton's old rent under this lease was £9 13*s.* 6*d.*, and Kernoghan's £10 16*s.* 10*d.* About the time that these leases expired Sir Charles Lanyon had his whole estate valued by three valuators, with a view of having his rents revised: one of which valuators being a Mr. Raphael, who had been connected with the estate since a period anterior to Sir Charles Lanyon's purchase, Sir Charles determined to act on his valuation, which was the lowest, and accordingly soon after the time that the old leases dropped a circular (to a copy of which we refer) was sent to each of the tenants, informing him of the amount of Mr. Raphael's valuation, and that he could have a thirty-one years' lease containing similar provisions to those contained in the expired lease at that rent, or a fee-farm grant at that rent on payment of a fine equal to eight years' purchase of the new rent. Such circulars were sent to the tenants in the present cases. On the 11th December, 1876, Mr. Lanyon, Sir Charles' eldest son, and agent, attended at the Adair Arms Hotel, Ballymena, to collect rents and arrange with the various tenants the new contracts of tenancy. Mr. Hugh Orr, his solicitor, was with him; each of these tenants came and offered his rent; they came separately and alone, and Mr. Lanyon told them they could now have either a thirty-one years' lease, subject to similar conditions as those contained in their old leases, at the rents stated in Mr. Raphael's valuation, or fee-farm grants at that rent upon payment of eight years' rent as fine, but that he could not have one different from the rest as tenant from year to year, and that he could not have one holding out and the others not, and that a number of other tenants had already signed. Kernoghan stated that he objected, and said the rent was too dear, and he would rather have no lease. Clinton also objected to the rent and to taking a lease. Mr. Lanyon refused to take rent from either of them until he signed a proposal for a lease, and said if he did not do so the land was the landlord's. He also explained to each of them, that if he took a thirty-one years' lease, he could not sell, but if he signed for a thirty-one years' lease, he could afterwards have a fee-farm grant instead, and then could do what he liked with the land. Ultimately each of them signed a proposal for a thirty-one years' lease, paid the year's rent due, and left, and had no further negociations with Mr. Lanyon. The proposal in each case was the same, and we refer to a copy of the same. Each of these tenants subsequently intimated to Mr. Hugh Orr that he would take a fee-farm grant instead of a lease, and Kernoghan signed the following at the foot of his proposal:—"I consent to pay you eight years' rent, on condition of your giving me a fee-farm grant." The evidence was that each tenant took the grant instead of the lease voluntarily after he had signed the proposal for the lease; that once he had signed a proposal for the lease he had no further dealings with Mr. Lanyon on the subject, and the change from the lease to the grant was made by the tenants themselves voluntarily. Fee-farm grants were ultimately executed, and fines amounting to eight years' rent paid, and we refer to the said fee-farm grants. The said fee-farm grants were afterwards set aside by the Land Commission, under the 2nd section of the Land Law (Ireland) Act, 1887; and on a case stated for the consideration and decision of Her Majesty's Court of Appeal in Ireland it was held that, under the circumstances stated, it was competent for the Land Commission to declare these fee-farm grants to be void under the provisions of the section above-mentioned. Each of the said tenants then served an originating notice to have a fair rent fixed, and on the hearing thereof the question was raised in each case, whether in fixing such rents regard could be had to the fines paid by the tenants under the circumstances aforesaid. We were of opinion that it was competent for us to take the payment of the fine into account, as a ground for reducing what otherwise would be the fair rent of the holding; but on the application of counsel for the landlord, we agreed to state this case for the consideration and decision of Her Majesty's Court of Appeal in Ireland. The question for such consideration and decision is "whether as a matter of law it is competent for the Land Commission, in fixing the fair rent in each of these cases, to take into account, as a ground for reducing the rent, the said sums paid by the tenants by way of fine for procuring the execution to them of the said fee-farm grants."

The details of the several documents referred to in the case stated are immaterial for the purposes of this report.

Campbell, Q.C., and *R. F. Harrison*, for the appellants:—

No terms were imposed by the order of the Land Commission, by which these fee-farm grants were set aside; the fee-farm grants were simply declared void. When the grants were being set aside was the time to deal with the fines, if at all: sect. 2 of the Land Law (Ireland) Act, 1887. Suppose that instead of fines, exorbitant rents had been reserved for the first eight years after the making of the grants, could the excessive rents be taken into account? Compare the language of section 2 of the Land Law (Ireland) Act, 1887, and of section 1 of the Redemption of Rent Act, 1891, and it will be seen that a grantee, whose grant is set aside under the former is in the same position as a grantee who comes in to redeem his rent, and proceeds to fix his fair rent under the latter. *Mollan* v. *Kieran* (1) is an express decision that no account is to be taken of a fine paid for a fee-farm grant, when the fair rent of the land conveyed by it is being fixed under the Redemption of Rent Act, 1891. Section 8, sub-sect. 10, of the Land Law Ireland Act, 1881, is very precise in its terms: "the amount of money that may have been given for *the tenancy*": the fines were not given for the tenancies in respect of which these tenants seek now to fix fair rents: the fines were given for fee-farm grants which are gone. Sub-section 10 of section 8 of the Act of 1887 is impliedly negative. It enumerates all the circumstances under which a fine paid to the landlord is to be regarded. It thus impliedly negatives the fine being taken into account under other circumstances. A fine is to be regarded, therefore, only when paid for the actual tenancy in respect of which the fair rent is being fixed. Section 2 of the Act of 1887 contains the whole

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(1) [1894] 2 Ir. R. 27.

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law under which the fee-farm grants were to be dealt with: they were wiped out by the order of the Land Commission, but no further relief was given to the tenants: they were left as they were as to the fines.

R. F. Todd, for the respondents:—

The fines paid by these tenants can be taken into account by the Court fixing the fair rents of these holdings under the words "considering all the circumstances of the case," section 8 of Land Act of 1881. Sub-section 10 of the same section shows that it was within the contemplation of the Legislature that a fine paid for a tenancy should be regarded as a matter affecting the amount of rent to be paid: the object of that sub-section was merely to prevent a tenant from claiming against his landlord a reduction of rent to be calculated on an exorbitant price which he may have given for the tenant-right. The tenancies under which the respondents hold were given to them by the statute in substitution for the fee-farm grants for which they paid these fines. [He cited *O'Neill* v. *Cooper* (1)].

Nov. 6.

WALKER, C.:—

We have heard this case very fully argued, and we are of opinion that the decision of the Land Commission is right.

We must take it that the fee-farm grants under which the tenants held have been rightly set aside. They were fee-farm grants in a very simple form, whereby the holdings which form the subject-matter of this case were granted to the tenants in consideration of the fee-farm rents thereby reserved, and of two several sums—in the nature of fines—calculated at eight years' rent in the case of each holding respectively.

The effect of section 2 of the Land Law (Ireland) Act, 1887, is the first matter which we have to consider. That section says:— "In case of a lease or grant existing at the date of the Land Law (Ireland) Act, 1881, and executed since the first day of January, one thousand eight hundred and sixty-nine, of a holding *bona fide* in the occupation of the tenant or grantee, and to which, but for the length of the term, section 1 of this Act would apply, if the Court is satisfied that the acceptance thereof by the tenant or grantee was procured by the landlord by threat of eviction or undue influence, or other inequitable means, the Court may, upon the application of the tenant or grantee made within six months after the passing of this Act, declare such lease or grant to be void as and from the date of the order"—that has been done in this case—" upon such terms as to costs and otherwise as the Court may deem just." As a matter of fact no terms were imposed by the orders setting aside the two fee-farm grants mentioned in the case stated, and we are quite free from any difficulties or embarrassment arising from any engrafted conditions. The section continues:—" And thereupon such tenant shall be deemed to be tenant of a present ordinary tenancy from year to year at the rent mentioned in such lease, and subject to such conditions thereof as the Court may deem just." The orders made by the Land Commission said nothing about any of the conditions comprised in these fee-farm grants. They simply set the grants aside; and, therefore, the two tenants, Clinton and Kernoghan, held, and now hold, their respective holdings on the terms of their respective fee-farm grants, so far as the same are applicable to the statutory present tenancies substituted by the Act of Parliament for the grants that have been set aside, with the incidental right of fixing a fair rent under the provisions of the Act of 1881.

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(1) [1894] 2 Ir. R. 31 *n.*

In considering on what principle the fair rent is to be fixed we are referred to section 8 of the Act of 1881, which says:— "The tenant of any present tenancy," *i.e.* either of these men "may from time to time during the continuance of such tenancy apply to the Court to fix the fair rent to be paid by such tenant to the landlord for the holding; and thereupon the Court, after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, may determine what is such fair rent." These are words of the widest character, and I think have been advisedly left in this wide form. "All the circumstances of the case" do not, of course, mean that the Land Commission are to take into account matters merely personal to the tenant. But it would in no way strain the meaning of the words if we read them as

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giving power to the Land Commission to take into account a fine paid by the tenant for the tenancy with which they are dealing. I think the words mean "all the circumstances connected with the tenancy."

It was urged on behalf of the landlord that the only part of the Act dealing with the subject-matter of fines was sub-section 10 of sect. 8: at the same time it was admitted that a fine given by a tenant of an ordinary present tenancy to which the Act applied should be taken into account. Under what branch of the section does this power arise? The 10th sub-section is not of an affirmative character, and I think it involves that when money is paid to the landlord it may be taken into account under the earlier part of the section. It assumes the power of taking the payment of a fine or money's worth into consideration, but controls the consideration of it in the particular case specified.

I think the Court has power to take a fine into account under the language of sub-section 1, or at all events under that sub-section coupled with sub-section 10; and in my opinion the true construction of both sub-sections is this:—Where money has been paid to the landlord for the tenancy of any holding, or for what (as here) has been, by virtue of the statutory powers of the Land Commission, transmuted into the tenancy of a holding, that money may be taken into account by the Court fixing the fair rent, but to what extent is left in the widest terms to the discretion of the tribunal.

It was contended that this view is inconsistent with the decision in *Mollan* v. *Kiernan* (1). The learned Judge who decided *Mollan* v. *Kiernan* (1) does not, as appears from his judgment in this case, think so, and he has suggested apparently substantial distinction between the cases. Be that as it may, the propriety of the decision in *Mollan* v. *Kiernan* (1) is not now before us, and I decline to enter upon the consideration of it. In my opinion we should answer the question submitted to us in this case by the Land Commission in the affirmative.

SIR PETER O'BRIEN, C.J.:—

I agree with the Lord Chancellor. I had some difficulty about the case at first, and my mind rather fluctuated during the argument. However, I have come to the conclusion that the fines paid by these two tenants may be taken into account in fixing the fair rents of their holdings under the words "all the circumstances of the case." I think the object of the Legislature was to give the fullest scope to the Land Commission in fixing fair rents, and therefore it has employed, in framing the Act, language of the very widest character.

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(1) [1894] 2 Ir. R. 27.

The language of sub-section 10 implies that money in the nature of a fine paid to the landlord may be taken into account, but I do not think that the power to take it into account is expressly conferred by that sub-section. The only words which I can find large enough to confer such a power on the Court are those in sub-section 1:—"Thereupon the Court, after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and considering *all the circumstances of the case*, holding, and district, may determine what is such fair rent." It seems to me that this language is wide enough to enable the Land Commission to take into account, in fixing the fair rents of these holdings, the fines paid by the tenants for the fee-farm grants for which their present tenancies are practically statutory substitutes.

FITZ GIBBON, L.J.:—

I agree. I do not think that the fee-farm grants are to be entirely thrown out of consideration. They were the root of the present tenancies, and the fines which were paid for them seem to me to be among "the circumstances of the case" to which the Land Commission is directed to have regard.

Solicitor for the landlord: *Orr.*
Solicitor for the tenant: *Caruth.*

G. Y. D.

Q. B. Div.
1894.
Nov. 2, 17.

IN RE DOHERTY'S PRESENTMENT (1).

(CO. LONDONDERRY PRESENTMENTS, 1894.)

Grand Jury—Road contract—Application for payment—Certificate of county surveyor—Power to certify and to present for payment half-yearly, for period still incomplete—Power to certify and to present for portion of sum applied for by contractor—Power to represent for residue—6 & 7 Wm. 4, *c.* 116, *s.* 130.

D.'s tender for keeping in repair 1620 perches of road, at 11*d.* per perch per annum for five years from the Summer Assizes, 1893, was accepted and fiated at said Assizes. In October, 1893, D. applied for payment, as for one half year, of £37 2*s.* 6*d.* Upon this application the county surveyor indorsed his certificate that the work had been "duly executed according to contract, to the amount of £35 6*s*. 6*d*.," leaving a balance of £1 16*s*. to be represented. At the Road Sessions in November, 1893, this application, so indorsed, was allowed; and, at the Spring Assizes following, the Grand Jury presented the sum of £35 6*s*. 6*d*., to be paid to the contractor, and represented the balance, £1 16*s*. On motion by a cesspayer to make absolute a conditional order for a writ of *certiorari* to quash said presentment and representment, on the ground of illegality, it being contended that the county surveyor could only certify for the full amount payable, or not at all:—

Held, that the order for a writ of *certiorari* must be made absolute, the certificate and the presentment being in respect of a sum claimed as payable for keeping the road in repair for a period then not yet ended, and therefore premature.

Per Holmes, J.: By the terms of such a contract a contractor would only be entitled to payment at, but not before, the end of each year, if he had duly performed the work up to that date.

Quaere—Assuming that the time for payment had arrived, was it legal for the county surveyor to certify for a portion of the amount payable, and for the Grand Jury to present such portion, and to represent the residue?

Re Bradley (Ir. Circ. Rep. 320) questioned.

CERTIORARI.

Motion, on behalf of James Mac Intosh, a cesspayer, to make absolute a conditional order for a writ of *certiorari* to remove and

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(1) Before HARRISON, JOHNSON, HOLMES, and MADDEN, JJ.

Q. B. Div.
1894.

In re DOHERTY'S PRESENTMENT.

quash all and singular presentments and representments of the Grand Jury of the county of Londonderry, passed at the Spring Assizes, 1894, representing the sum of £1 16*s*., and presenting the sum of £35 6*s*. 6*d*., to be paid "to William Doherty, to keep in repair for five years, from Summer Assizes, 1893, the road or portion of the road" in said presentment mentioned, on the grounds that said presentments were made without, and in excess of, jurisdiction, and that the action of the Presentment Sessions in the premises was *ultra vires*, irregular, and illegal.

Doherty's tender, dated the 26th June, 1893, was in the following form, for the execution of the following work, viz.: "'To keep in repair for five years, from the Summer Assizes, 1893, 1620 perches of road . . . according to the general specification for keeping roads in repair . . . not to exceed 11*d*. per perch per annum,' at the rate of 11*d*. per perch per annum, the work to be executed and the contract carried out in every respect in accordance with the general specification of the County Surveyor last issued and the terms of the advertisement for tenders. . . ." The tender gave the names of Doherty's proposed sureties, who subsequently with him entered into the usual recognisances.

The tender was accepted and a presentment made at the Summer Assizes, 1893, which appeared in the Grand Warrant of said Assizes (1893) as: "No. 696. To William Doherty, of Lisglass, to keep in repair . . . at 11*d*. per perch per annum. First half-year, £37 2*s*. 6*d*." (1).

In the month of October, 1893, Doherty put in an application (following Schedule X, Form K) "for payment by a contractor for works of maintenance—6 & 7 Wm. 4, c. 116, ss. 20, 52"—which recited that at the Summer Assizes, 1893, the said 1620 perches "were presented to be kept in repair for five years by contract at the yearly sum of £74 5*s*.," and that the applicant (Doherty) contracted for the same, and continued: "Now this is to certify that the said perches, and every part thereof, have been kept in good and sufficient repair and condition since the commencement of my contract in conformity with the presentment and the specification of the County Surveyor, and that the said perches, and every part thereof, are now in good and complete repair and condition, and that the said perches are free from nuisances, and I hereby apply for payment of the sum of £37 2*s*. 6*d*. for keeping the same 1620 perches in repair for one half-year. (Signed), William Doherty, contractor."

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(1) On this Grand Warrant the various road contracts are set out, the contract price being stated at so much "per perch," or so much "per perch per annum," and the amount presented for being in each case stated to be the amount for one half-year—first, second, or third half-year (as the case might be) in advance.

Upon this application was indorsed the following:—

INDORSEMENT.

No. 196.	Half barony of Tirkeeran.	£1 16*s*. 0*d*. represent.
	WM. DOHERTY.	35 6*s*. 6*d*. pass.

I certify that this work has been duly executed according to contract, to the amount of £35 6*s*, 6*d*.—A. C. ADAIR, *County Surveyor*.

This application, with the certificate of the County Surveyor thereon, was laid before the Justices and cesspayers at the Road Sessions for the half-barony on the 14th November, 1893, and was allowed, and indorsed accordingly, "*Allowed. E. S. Lecky, Chairman*," and subsequently was laid before the Grand Jury at the Spring Assizes, 1894, and passed, and indorsed accordingly, "*Ordered. J. B. B., Foreman*."

Objection was made to the fiating of this presentment, by which the sum of £1 16*s*., part of the sum of £37 2*s*. 6*d*., was represented, and the balance, £35 6*s*. 6*d*., was presented to be paid to said William Doherty, before the going Judge of Assize, Mr. Justice Andrews, who, having heard Mr. Todd (solicitor for the objector, MacIntosh), and the solicitor for the Grand Jury, and having taken time to consider, held that the County Surveyor was entitled to certify for a part, and to refuse to certify for the remainder. The learned Judge declined to state a case upon the matter.

The applicant alleged in his affidavit grounding the present motion, that the County Surveyor had not informed Doherty that the said road or any part thereof was not in proper repair, and did not require the said Doherty to put the same in repair, nor had he himself caused any part thereof to be repaired, nor had taken any of the steps prescribed by 6 & 7 Wm. 4, c. 116, s. 54, nor had he summoned the said William Doherty or his sureties before the Justices, or taken any of the proceedings prescribed by 19 & 20 Vict. c. 63, s. 17, nor had any proceedings been taken against the said William Doherty or his sureties on foot of their bond.

Houston, Q.C. (with him *A. Todd*), for Mac Intosh .—

Under the Grand Jury Act (6 & 7 Wm. 4, c. 116, s. 130), a contractor must make application for payment at Presentment Sessions, and as a condition of success must obtain a certificate from the County Surveyor "of the due execution of the work or performance of the contract." We submit that the County Surveyor can only certify that the work has, or that it has not, been duly executed, *i.e.* that he can only certify for the amount for which application is made, or not at all: *Re Hackett* (1). The deduction here made (£1 16*s.*) is an avowal that the work has not been duly executed. Accordingly, the County Surveyor should have refused his certificate: see *Re Bradley* (2). He could himself have put the road in repair, and deducted the expense of this from the amount payable to the contractor (6 & 7 Wm. 4, c. 116, s. 54), or he could have summoned the contractor under 19 & 20 Vict. c. 63, s. 17. [Holmes, J.: A private person employing a road contractor to keep a road in repair for twelve months would not be liable, if the road was not in repair at the end of the period, to give any remuneration at all.] Schedule X., Form K, requires the contractor himself to certify in his application that he has kept the road in repair, &c. The certificate of the County Surveyor is a condition precedent—essential to the approval by the Presentment Sessions of the application for payment: *Anon* (3); and the Grand Jury can only pass presentments which have been properly before the Presentment Sessions: *Driscoll's Presentment* (4).

Denis Henry, for the Grand Jury :—

Section 42 (6 & 7 Wm. 4, c. 116) enumerates, among the duties of the County Surveyor, that he is to attend at Presentment Sessions, and report on all applications on the part of contractors, and on the performance of all contracts, and on the state of all roads, &c., and whether each contractor is entitled to payment, *and how far*. This section contemplates, and shows that section 130 must contemplate, payment of portion of the amount payable under the contract where portion of the work has been duly executed. We have ascertained that the same practice is followed in county Tyrone, and was there sanctioned by a decision of Fitzgerald, B. The form of application (Schedule X., Form K) further supports this view, being for payment "for —— months." Sectiou 38 provides that the Grand Jury may not make presentments for raising any money "for which an application shall not have been made or approved of at Sessions, either in whole or in part, as hereinbefore provided," pointing to the legality of a presentment for portion of the amount claimed as payable to the contractor. [HARRISON, J.: The Presentment of the Grand Jury definitely accepting the tender was originally made at the Summer Assizes, 1893. The contractor applies for payment for six months in October, 1893. This would be premature, even assuming that the contract-money was payable half-yearly. HOLMES, J.: It would be an easy matter to state in the contract that the contractor should be paid a certain amount at the end of each half-year, if the road was in proper repair.] Under section 130 the Grand Jury have a full discretion to pass or disallow presentments made at the Sessions, and under the circumstances of the present case this Court should not interfere with that discretion, or go behind the presentment: *Re Henn* (1).

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(1) Brett's Grand Jury Laws, p. 77.
(2) Ir. Circ. Rep. 320.
(3) Res. Cases, 1860-1864, p. 6; noted in Vanston, p. 118.
(4) Ir. R. 3 C. L. 16.

A. Todd, in reply.

Cur. adv. vult. (2).

Nov. 17.

HARRISON, J.:—

In this case a *certiorari* has been obtained to remove into this Court, for the purpose of being quashed, a certain presentment of the Grand Jury of the city and county of Londonderry at the Spring Assizes, 1894, whereby certain moneys were presented to be paid to William Doherty for the keeping in repair portion of a certain road as specified, and a sum of £1 16*s.* was re-presented in respect of the contract entered into by William Doherty in respect of said portion of road.

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(1) 6 Ir. C. L. R. 237.

(2) When judgment was delivered, Mr. Justice Madden was absent at *Nisi Prius*.

It appeared from the documents submitted to us that the said William Doherty, on the 26th June, 1893, sent in a tender for keeping in repair for five years from the Summer Assizes, 1893, 1620 perches of a road specified in the tender, at the rate of 11*d.* per perch per annum.

The tender was accepted, and the Grand Jury of the said city and county passed a presentment to the said William Doherty to keep in repair for five years from the Summer Assizes, 1893, the said 1620 perches of road (described in the presentment) at 11*d.* per perch per annum, and the amount of the first half-year's payment was stated to be £37 2*s.* 6*d.*

On the 19th October, 1893, the said William Doherty put in an application to the proper presentment sessions, in which he applied for payment of the sum of £37 2*s.* 6*d.*, for keeping in repair the said 1620 perches of road for one half-year, certifying that he had duly executed said work.

The county surveyor certified by indorsement on the application that the work had been duly executed according to contract to the amount of £35 6*s.* 6*d.*, and a sum of £1 16*s.* was indorsed to be re-presented, and £35 6*s.* 6*d.* was passed. The Grand Jury at the Spring Assizes presented the sum of £35 6*s.* 6*d.* to the contractor, and re-presented the sum of £1 16*s.* mentioned, by indorsement on the application.

It was argued before us that this splitting up of the sum applied for was illegal, and that the presentment sessions, under sect. 130 of the 6 & 7 Wm. IV., c. 116, had only jurisdiction to "allow" or "disallow" the application made at sessions, and further, that the Grand Jury were also limited in like manner.

It is not, in my opinion, necessary for us to express any opinion on this question on the present motion, as I think that the application of the contractor, for payment of one-half year's allowance for keeping said portion of said road in repair for one-half year, made on the 19th October, 1893, in respect of the said presentment made at the Summer Assizes, 1893, was clearly premature, and should not have been then entertained; and that the presentment passed at the following Spring Assizes, 1894, for the city and county of Londonderry, grounded on the certificate indorsed on said application, cannot be supported, and must be quashed.

The 130th sect. authorises the contractor "on the completion of the work for which he may have contracted, or whensoever by the terms of such contract he may be entitled to payment," to give notice to the county surveyor ten days before the first presentment sessions after every Assizes of his intention to make application for payment of the sum contracted for by him: and said section, after providing for the examination of all such applications in the presence of the county surveyor, and the decision of the sessions in reference thereto, provides that same shall be delivered to the secretary of the Grand Jury, to be laid before them at the next ensuing Assizes; and such Grand Jury shall take such applications as have been approved of into consideration, and allow or disallow the same according to their discretion; but it shall not be lawful for such Grand Jury, or for the Court, to allow any application which shall not have been approved of at such sessions, &c.

The tender of the contractor approved of was in its terms to keep in repair a portion of a certain road for five years, at the rate of 11*d.* per perch per annum. The presentment at the Summer Assizes in July, 1893, was a presentment to the contractor to keep 1620 perches of said road in repair for five years, at 11*d.* per perch per annum. On the 19th of the following month of October he applies for payment of the sum of £37 2*s.* 6*d.* for keeping the said 1620 perches in repair for one half-year, and the county surveyor certifies for £35 6*s.* 6*d.*, in respect of the due execution of the work according to contract, and that £1 16*s.* should be re-presented.

I am of opinion that this application was premature, and that the presentment founded thereon cannot be supported, and should be quashed.

Johnson, J. :—

By presentment at the Summer Assizes, 1893, for the county of Londonderry, Doherty became contractor for the maintenance of 1620 perches of a road for five years at 11*d.* per perch per annum. Worked out in figures, this amounts to £74 5*s.* yearly, payable, according to the practice of the county (as stated by both sides at the bar) in two equal parts of £37 2*s.* 6*d.* each, one part at the Spring, and the other at the Summer Assizes. The periods between the two Assizes are uneven, the period from the Summer to the Spring Assizes being double as long as the period from the Spring to the Summer Assizes. The manner in which a Grand Jury contractor is to obtain payment is provided by the 130th section of the Act (6 & 7 Wm. 4, c. 116). His right to payment only arises "on completion of the work for which he may have contracted, or whensoever by the terms of such contract he may be entitled to payment." Then he is to give notice to the county surveyor, at least ten days before the first presentment sessions after every Assizes, of his intention to make application for payment, and require of such county surveyor a certificate of the due execution of such work, or performance of such contract. The application is then, as provided by this section, brought before the Justices and cesspayers, at the prescribed presentment sessions, who "shall examine into the application, and inspect the notices and certificates, and examine the surveyor and such other persons as they may think necessary for the purpose of ascertaining the due execution of the work or matter contracted for, and allow or disallow the application." If allowed at presentment sessions, the application then comes before the Grand Jury at the next Assizes, "who are to allow or disallow the same according to their discretion."

In October, 1893, less than three months after the presentment at the Summer Assizes, and more than five months before the ensuing Spring Assizes, Doherty gave notice to the county surveyor of his "intention to apply for £37 2*s.* 6*d.* for keeping the said road in repair for one half-year," and required the county surveyor's certificate of the due performance of his contract. The contract was a yearly one, the payment to be presented only at each Assizes; and, in my opinion, Doherty had not brought himself within the provisions of the 130th section as entitled to a payment either "on completion of the work" for which he had contracted, or "by the terms of his contract." However, the county surveyor, as stated in Mac Intosh's affidavit, then gave him a certificate in the following form:—

> "£1 16*s*. 0*d*. Rep." (This means that the county surveyor intends this part of the contract-money to be represented.)
>
> "£35 6*s*. 6*d*. Pass." (This means, Allow the application.)
>
> "No. 696. Half Barony of Tirkeeran.
>
> "WILLIAM DOHERTY.
>
> "I certify that the work has been executed according to contract to the amount of £35 6*s*. 6*d*.—J. A."

Thus, I think, the county surveyor, within three months from the commencement of the contract, certified, on the contractor's application for six months' payment, that the work has been executed according to the contract to the amount of the half-year's money, except £1 16*s*., which is to be represented to the general credit of the barony or county instead of being applied to the repair of the road, for which no provision was made, according to these proceedings, for at least four months up to the Spring Assizes of the county of Londonderry on the 20th March, 1894.

The county surveyor's certificate is a condition precedent to the allowance or disallowance of the contractor's application. But in the present case the application was made and the certificate given before "the completion of the work," and before, "by the terms of the contract," the contractor was entitled to payment. Consequently, neither the presentment sessions nor the Grand Jury at the Spring Assizes had under these circumstances jurisdiction to allow the application. It is to be observed that if a road is not in proper repair owing to the default of the contractor, the county surveyor is armed with ample powers to secure the proper repair of the road by the Grand Jury Act (6 & 7 Wm. 4, c. 116, s. 54), and by the 19 & 20 Vict. c. 63, s. 17; and this Court has not been referred to any statutable or other authority enabling a county surveyor to certify that part of the contract money is to be represented, instead of either going to the contractor or being expended on the repair of the road.

Holmes, J.:—

As I have no doubt that the presentment is illegal, I think that the writ of *certiorari* ought to go, although the grounds of the decision of the Court must prove unsatisfactory to Grand Jury contractors generally, and were, perhaps, not anticipated by the ratepayers who obtained the conditional order.

The impeached presentment was made at the Spring Assizes, 1894, for payment to a contractor in respect of work alleged to have been performed by him pursuant to a contract to keep portion of a high-road in repair, entered into at the Summer Assizes, 1893. The only thing relating to the time or mode of payment contained in the documents that constitute the contract is that the road was to be kept in repair for the period of five years at a certain sum per perch per year. If this was a contract between individuals I would construe it as entitling the contractor to payment at, but not before, the end of each year, if he had duly performed the work up to that date; and I see no reason for giving it a different construction where it is made with a public body. The 130th section of the Grand Jury Act prescribes the steps to be taken by a contractor when the period of payment has arrived. It prescribes that, "on the completion of the work, or whensoever by the terms of the contract he is entitled to payment," he is to obtain from the county surveyor "a certificate of the due execution of the work or performance of the contract," and he is to lodge within a time specified with the Secretary of the Grand Jury a notice of his intention to apply for payment of the sum contracted for by him. These are the preliminary steps to a presentment being made for payment. No such presentment would be legal unless they had been previously taken; and it is clear from the language of the section, as well as from the form of application (Form K in Schedule X of the statute), that they cannot be taken until the money applied for is payable by the terms of the contract, and has been earned by the performance of the work up to that date.

Under these circumstances, I am unable to see how it was possible to have either a legal application, or certificate, or presentment, under the contract in question until the first year had expired. Of course, the contract might have provided for payments being made at periods shorter than a year; and I gather from Form K, already referred to, that it contemplates payments covering a certain number of months; but we have nothing of this kind here; and, if the times of payment are not fixed by the contract, how are they to be fixed? We are told that it is usual for presentments for payment in respect of contracts of maintenance to be made twice a-year, and we have been referred to the 52nd sect. as justifying this course. That section enables the Grand Jury to accept a continuing contract to repair a high-road, and to present for the payment of the contractor from time to time; but I think that this can only mean from time to time, as provided by the contract. The Grand Jury cannot, having regard to the 130th section, make a presentment for payment of its own motion, and I am unable to conceive that the Legislature intended that the contractor was to procure a certificate and apply for a presentment at any time he might think convenient. But, even if I were to assume that, by virtue of custom or usage or implied agreement, the contractor was entitled to take steps to obtain a presentment in October, 1893, it is quite clear that it could only be for payment for work done up to that date. In this case, however, the contractor's application is not only for one-half of the annual amount, but in respect of half a-year's work; and, as for the certificate, the county surveyor might be able to explain it; but as it stands, and without explanation, it is to my mind unintelligible. I cannot make even a guess as to what it means. I must assume, however, that it was for keeping the high-road in repair for half a-year, of which only three months had expired when the certificate was given, and this violates the express terms of the statute. I am aware that in some counties the practice exists of road contractors applying to presentment sessions before they have earned the money. It is, I suppose, considered an innocent practice, as they will have earned it before a presentment is made by the Grand Jury. It is, however, illegal, and custom does not justify illegality.

Under these circumstances, I am of opinion that this presentment ought to be quashed. I offer no opinion on the matter chiefly argued. If the time for payment had arrived, the question might have arisen whether the county surveyor was authorized to certify for a portion of the amount payable. Dr. Houston argues that the certificate ought to cover the whole sum, or be withheld altogether. I do not decide against this view, but I would require further consideration before I could adopt it.

Q. B. Div.
1894.
In re Doherty's Presentment.

Solicitor for James Mac Intosh: *R. H. Todd.*
Solicitor for the Grand Jury: *B. H. Lane.*

A. E. R. J.

MOLONY *v.* HARNEY(1).

(1894. No. 2791.)

Q. B. Div.
1894.
Dec. 17, 20.

Husband and wife—Judgment against married woman in respect of ante-nuptial debt—Separate estate, with restraint on anticipation—Receiver by way of equitable execution—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75)*—Decision of Vacation Judge.*

Where a woman married after the 1st January, 1883, is entitled to separate estate restrained from anticipation under a settlement, not being a settlement of her own property made by herself, an ante-nuptial creditor, who has obtained judgment against her in the form settled in *Scott* v. *Morley* (20 Q. B. Div. 120), cannot enforce a judgment, obtained against such woman after marriage, by the appointment of a receiver over such separate estate, or the income thereof.

Kirk v. *Murphy* (30 L. R. Ir. 508) overruled.

Motion, on behalf of the executors and trustees of the will of Richard Harney, deceased, to discharge an order, dated 1st August, 1894, made in this action, on the ground that it was made in ignorance of material facts, and without jurisdiction, and for costs.

The action was instituted against the defendant Josephine Harney to recover the sum of £35 15*s.* 1*d.* for goods sold and delivered. The writ was issued and served on the 24th March, 1894. No appearance was entered. On the 30th April, 1894, the defendant married. On the 11th June, 1894, judgment was entered (pursuant to leave granted) for the plaintiff, with costs, in the form settled in *Scott* v. *Morley* (1), upon the application of the plaintiff, and upon his affidavits, stating the above facts, and stating that the defendant, under the will of her father Richard Harney, deceased, was entitled to a legacy of £3000, and a share in his residuary estate, the income of which, it was deposed, might be made available to pay the amount of plaintiff's claim when judgment had been obtained.

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(1) Before Harrison, Johnson, and Holmes, JJ.

On the 1st August, 1894, the plaintiff obtained from Madden, J., an order appointing him receiver by way of equitable execution of the beneficial interest of the defendant in said legacy of £3000 and share in the residuary estate of said Richard Harney, deceased.

This order the executors and trustees of the will of Richard Harney now sought to have discharged, grounding their application upon an affidavit deposing to the facts, and exhibiting a copy of said will (dated 29th June, 1891), by which said Richard Harney, who died on the 30th October, 1893, bequeathed to his daughter, the defendant, the sum of £3000 and a distributive share in his real and personal estate upon trust that said legacy and distributive share should be invested by his trustees in trust to pay the income thereof to the defendant during her life, and, after her decease unmarried, upon certain trusts therein mentioned; but in case the defendant should marry with the consent of the testator's trustees, then in trust to pay the income thereof to the defendant during her life, and so that during her coverture the same should be for her sole and separate use, and that she should not have power to dispose thereof in the way of anticipation, and, after the decease of the defendant, upon trusts not here material. Probate of said will was, on the 17th January, 1894, granted to the executors and trustees named therein. The defendant married with the consent of the trustees, as required by the will of the testator.

D. B. Sullivan, Q.C., for the applicants:—

The judgment obtained in this case follows the terms adopted in *Scott* v. *Morley* (1). Execution is thereby limited to the defendant's separate estate which she is not restrained from anticipating, thus expressly preventing the plaintiff from seeking a receiver over such property or the income of it: *Hood-Barrs* v. *Cathcart* (1). Section 19 of the Married Women's Property Act, 1882, does not affect the case, as the property here was so settled on the defendant under the will of her late father.

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(1) 20 Q. B. Div. 120.

Kirk v. *Murphy* (2) may be undistinguishable; but that was the decision of a Vacation Judge, and should not conclude the matter from re-argument in the Divisional Court.

Carton, Q.C., and *R. F. Doyle*, for the plaintiff, relied on the judgment and decision of Madden, J., in *Kirk* v. *Murphy* (2).

D. B. Sullivan, Q.C., in reply.

[Counsel also referred to *Robinson, King, and Co.* v. *Lynes* (3); *Jay* v. *Robinson* (4); *Hood-Barrs* v. *Cathcart* (5)] (6).

Cur. adv. vult.

JOHNSON, J.:—

Dec. 20.

This is a motion to discharge an order of the 4th August last appointing a receiver by way of equitable execution over separate property of the defendant, a married woman, who is restrained from anticipation. The judgment in this case is in the form settled in *Scott* v. *Morley* (7), after deliberation, and is:—"Execution as far as regards her (the defendant) is to be limited to her separate property, not subject to any restriction against anticipation, unless by reason of the 19th section of the Married Women's Property Act, 1882, such property shall be liable to execution, notwithstanding such restriction." Starting with this judgment, we are at once referred to the 19th section of the Act of 1882 to see what is the effect of this judgment. That Act was passed "to consolidate and amend" the Act of 1870; and the 19th section enacts that nothing in the Act shall affect any settlement before or after marriage, or interfere with, or render inoperative, any restriction against anticipation at present or hereafter to be attached to the enjoyment of property or income by a woman under any settlement, will, or other instrument; "but no

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(1) [1894] 2 Q. B. 559.

(2) 30 L. R. Ir. 508.

(3) [1894] 2 Q. B. 577.

(4) 25 Q. B. Div. 467.

(5) [1894] 3 C. D. 376.

(6) See *Lowry* v. *Derham*, supra, page 123.

(7) 20 Q. B. Div. 120, 132 [1887].

Q. B. Div. 1894.

MOLONY *v.* HARNEY.

Johnson, J.

restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." In the present case the property in question was derived by the defendant under a will which provided for its settlement on her in the event which happened. The settlement, therefore, must be referred back to the will, and was in effect the testator's settlement of his property on the defendant, subject to restraint on her anticipating the income. The property came to the defendant fettered by that restriction on anticipation. It never was her own property to settle, nor did she settle it; therefore it never was by reason of the 19th section of the Act of 1882 liable to execution notwithstanding the restriction on anticipation. The decisions under the Act of 1870 do not apply, and, in my opinion, the order of the 1st August must be discharged.

HOLMES, J.:—

I agree with Mr. Carton in thinking that this case cannot be distinguished in its facts from *Kirk* v. *Murphy* (1), and if this Court is bound to follow that decision, there would be no need for further consideration. I am of opinion, however, that it would be a new and dangerous application of the practice founded on the comity of Courts if we were to treat the decisions of the Vacation Judge and of Divisional Courts as of equal authority. It is true that in the case of both an appeal goes direct to the Court of Appeal, and that for some purposes the Vacation Judge is given the same jurisdiction as a Divisional Court. But, called on, as he is, to deal with matters of urgency in every Division of the High Court of Justice, under circumstances that make exhaustive discussion impossible, he would be placed in a position of great embarrassment if it were understood that he is not merely adjudicating upon the rights of the litigants before him, but laying down legal

(1) 30 L. R. Ir. 508.

principles from which the Divisional Courts would not be at liberty to differ. Accordingly, after conference with my brother Madden, whose experience as Vacation Judge is greater than that of any other member of the Bench, we have felt ourselves bound to reconsider the question determined by him in *Kirk* v. *Murphy* (1), treating his judgment as a strong, but not a conclusive authority. There is one difference between the present case and *Kirk* v. *Murphy* (1), which, although not sufficient to distinguish the one from the other in principle, enables us to submit the point at issue to a very simple and definite test.

In *Kirk* v. *Murphy* (1) the judgment was in the form used where the defendant is a spinster. Here it is in the form settled in *Scott* v. *Morley* (2), which defines, in express terms, the execution to which the plaintiff is entitled. Execution is limited to the separate property of the defendant, not subject to any restriction against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction. It is thus declared by the very terms of the judgment taken in connexion with the enactment referred to, that property which the defendant is restrained from anticipating is not to be affected by it, unless such restriction is contained in a settlement, or agreement for a settlement of the woman's own property, made or entered into by herself. In the present case, which, no doubt, resembles in this respect *Kirk* v. *Murphy* (1), no settlement or agreement for a settlement was made by the defendant; and the property sought to be taken by the plaintiff in execution was bequeathed to her by a will which contains the restraint on anticipation. It is, therefore, by the terms of the judgment, protected from execution. Nor could the judgment have been in any other form. *Scott* v. *Morley* (2) places an interpretation on the Act of 1882, which is embodied in the form of the judgment then settled and since adhered to.

Axford v. *Reid* (3), following *Sanger* v. *Sanger* (4), had decided that, under the Married Women's Property Act of 1870, all property belonging to a married woman for her separate use, whether or not such property was subject to a restraint on anticipation,

(1) 30 L. R. Ir. 508.
(2) 20 Q. B. Div. 120.
(3) 22 Q. B. Div. 548.
(4) L. R. 11 Eq. 470.

was liable to satisfy her ante-nuptial debts. If this continued to be the law in the case of a woman to whom the Act of 1882 applied, the form of judgment used since *Scott* v. *Morley* (1) would have been wholly misconceived. It was framed upon the assumption that the 19th section of the Act of 1882, for which there was no counterpart in the Act of 1870, had altered the law laid down in *Axford* v. *Reid* (2); and, in my opinion, this assumption is well founded. At all events, it is now too well settled to be questioned in this Court, and, therefore, I hold that the order appointing a receiver must be discharged, but without costs.

HARRISON, J., concurred.

Solicitor for the applicant: *J. Dunford.*
Solicitor for the plaintiff: *J. Rose Byrne.*

A. E. R. J.

Appeal. 1894. June 7, 8, 27.

THE QUEEN (MARSHALL) *v.* JUSTICES OF COUNTY TYRONE (3).

Licensing law—Certificate for spirit grocer's license—Suitability of premises—Licensing (Ireland) Act, 1874 (37 *&* 38 *Vict. c.* 69), *s.* 9.

On an application to Justices at Petty Sessions for a certificate for a spirit grocer's licence, under the Licensing (Ireland) Act, 1874, sect. 9, the Justices refused the application "on the ground of the unsuitability of the premises, from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." On appeal to Quarter Sessions, the Chairman and Justices refused the application "on the ground of the unsuitability of the premises." The Queen's Bench Division (Sir Peter O'Brien, C.J., *diss.*) refused to award to the applicant writs of *certiorari* and *mandamus* in respect of the said order and his application:—

Held (FitzGibbon, L.J., *diss.*), reversing the judgment of the Queen's Bench Division, that the matters stated as the grounds of refusal in the order of the Justices were not grounds on which the Justices should have refused the applicant a certificate as to the suitability of his premises.

(1) 20 Q. B. Div. 120.

(2) 22 Q. B. Div. 548.

(3) Before WALKER, C., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

Appeal.
1894.

THE QUEEN
v.
JUSTICES OF
TYRONE.

APPEAL from an order of the Queen's Bench Division, dated February 5, 1894, refusing to make absolute a conditional order obtained by the appellant for writs of *certiorari* and *mandamus* directed to the Chairman and Justices of county Tyrone, in regard to an order made by them at the General Annual Licensing Sessions, 1893, held at Strabane, refusing the application of the appellant for a spirit grocer's license, under sect. 9 of the Licensing (Ireland) Act, 1874, the ground of refusal being stated to be the unsuitability of the premises.

The facts are fully stated in the report of the case in the Queen's Bench Division [1894] 2 I. R. 246.

Campbell, Q.C., and *W. H. Brown*, for the appellant.

Bourke, Q.C., and *MacDermot*, for the respondents.

Cur adv. vult.

WALKER, C. :—

June 27.

In this case James Marshall applied to a bench of magistrates in county Tyrone for an original spirit grocer's license. The magistrates refused the application, the curial part of their order being "refused unanimously on the ground of the unsuitability of the premises, from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." The applicant appealed to the Quarter Sessions, and his appeal was heard on October 12, 1893, by the County Court Judge and the magistrates sitting with him, who refused his application. The order made at Quarter Sessions was "Affirm order. Refuse application on the ground of unsuitability of premises." Mr. Marshall, on October 27, 1893, obtained from the Queen's Bench Division a conditional order for a *mandamus* and *certiorari*. Cause was shown by the magistrates against that order, and on February 5, 1894, an order was made allowing the cause shown. Mr. Marshall has appealed from that order, and asks to have the conditional order for *mandamus* and *certiorari* made absolute.

The case is of importance, as it raises for the first time the question of the true construction of the words "suitability of the premises" in the spirit grocers' code, and the Judges in the Court below differed in opinion; and this and the fact that here Lord Justice FitzGibbon dissents from this judgment shows the question to be a difficult and doubtful one.

A short summary of the law relating to spirit grocers' licenses is necessary for the understanding of the case.

The law as to licenses for consumption on the premises and licenses to spirit grocers has been different from early times. It differed in amount payable and the facilities for obtaining the license. The former Act, relating to spirit grocers (4 Geo. 4, c. 81), provided that:—" Every retailer of spirits in Ireland being duly licensed to trade or vend and sell coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or premises of such retailer . . . shall be entitled to take out the license hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer, subject, nevertheless, to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as the same are repealed or altered by this Act." Therefore, as the law stood in 1825, a "grocer" was entitled to "retail" spirits in small quantities for consumption off his premises on taking out a license, and he could take out this license as of right. On the other hand, licenses for the sale of spirits for consumption on the premises were at that date only grantable if the conditions existed of (1) the production of the certificate of Justices authorizing the keeping of a common inn ale-house or victualling house, and (2) the production of a license for the sale of beer, cider, or perry by retail to be consumed in such house or premises. Persons disabled by conviction from holding a license to keep a common inn, ale-house, or victualling, became disabled from selling beer and selling spirits for consumption on their premises.

The subject of publicans' licenses was taken up by the Legislature in 1833, while spirit grocers were left as they were; and from 1833 a person seeking for a publican's license was, under 3 & 4 Wm. 4, c. 68, s. 4, liable to be met by objection " grounded upon the character, misconduct, or unfitness of the applicant, unfitness or inconvenience of the house or place, or number of previously licensed houses in the neighbourhood." From an early date, therefore, the "unfitness or inconvenience of the house or place" has been made a special subject of objection in the case of publicans' licenses. By the same section it is provided that if the magistrates are satisfied of the truth of the objection they are to refuse the license, and by their order, if they refuse, they are to declare the "reason or ground of such prohibition."

As regards spirit grocers, the 6 & 7 Wm. 4, c. 68, and 8 & 9 Vict. c. 64, gave powers of entry to Justices, constables, and overseers to enter any house or place kept by a spirit grocer for the purposes of supervision. "House or place" in the latter Act for that purpose is defined in the 17 & 18 Vict. c. 89, to extend to "every room, closet, cellar, yard, stable, outhouse, shed, or any other place whatsoever if belonging or in any manner appertaining to such house or place."

The next legislation on spirit grocers' licenses is contained in the Licensing Act, 1872, 35 & 36 Vict. c. 94, sect. 82 of which imposed a new condition on any person who at any time during the last two years had been a spirit grocer and who sought a renewal of his license. This condition was that he should produce to the Excise authorities the certificate of the Justices (1) as to his good character, and (2) as to the peaceable and orderly manner in which his business was conducted during the preceding year. Sects. 83-89 of the same enactment contain provisions relating to acts of spirit grocers, including making internal communication to places of public resort, and giving Justices and constables a power of entry "into any premises" kept by a spirit grocer.

Then comes the Act of Parliament which contains the provision on which this case immediately turns—the Licensing Act, 1874. The 9th section of this Act is as follows:—"The provisions of sect. 82 of the principal Act relating to the grant of new Excise licenses and renewals of Excise licenses to certain persons therein described, shall extend to the transfer of Excise licenses, and the said provisions so extended shall not be limited to the case of such persons, but shall extend and apply to all such transfers and grants when made to any other persons: provided always that in the case of a new Excise license or transfer of an Excise license under this section the certificate shall be to the good character of the person applying for the same and to the suitability of the premises." It will be observed that these words apply to a transfer as well as to a new license. The force of the word "suitability," if it be given the wide meaning attached to it by the majority of the Judges in the Queen's Bench Division, would include the consideration of the number of public-houses in the neighbourhood, and would thus bring in a ground of objection in the case of a transfer of a spirit grocer's license, which, according to *Clitheroe's Case* (1), is not available in the case of a transfer of a public-house license.

Now let us come back to section 82 of the Licensing Act of 1872, which, as we have seen, first imposed the necessity of obtaining a certificate from the magistrates on those seeking renewals of spirit grocers' licenses. The latter branch of this section provides that "all applications for such certificates shall be made in the manner, and subject to the like conditions as to appeals against the same, and otherwise (so far as the same are applicable) as are prescribed by 'The Beer Houses (Ireland) Act, 1864,' in relation to applications for certificates under the said Act." Thus we have incorporated in a compendious fashion in the enactment dealing with spirit grocers' licenses several of the statutory requirements prescribed by the 27 & 28 Vict. c. 35.

Section 3 of the latter Act is not unimportant. It enacts that any person applying for a license for the sale of beer by retail, or for a transfer or renewal of such a license, must obtain a certificate of good character of the applicant, and of the "suitability of the premises for the purpose of such sale"—which I read as meaning the same thing as "suitability of the premises" in the Act of 1874—"and if the application be for the transfer of an existing license, or the renewal of a license for the same house as shall have been licensed in the last year, a certificate of the good character of the person to be licensed, and of the peaceable and orderly manner in which the house has been conducted during the past year.

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(1) I. R. 11 C. L. 412.

Section 4 of the 27 & 28 Vict. c. 35, then enacts that persons applying for such certificates are to give twenty-one days' notice in writing to the police officers of such application, setting forth their place of residence, and the situation of the place or house for which the retail beer license is sought.

By section 13 of the same Act an appeal is granted from the decision of the magistrates on the application for the certificate, and the procedure upon that appeal is regulated by the 18 & 19 Vict. c. 62, and by 23 & 24 Vict. c. 35. By section 1 of the former of these Acts the magistrates who refuse to grant such a certificate are bound to state "the grounds of refusal" in like manner as required by sect. 4 of the Act of 1833; and by sect. 2 of 18 & 19 Vict. c. 62, it is provided that no other ground is to be acted upon in the appeal, except such as shall be stated in such order for refusal. The Act of 1860 (23 & 24 Vict, c. 35, s. 1) enables the Court of Quarter Sessions to entertain such an appeal, and hear it on the merits if the magistrates at Petty Sessions have omitted to enter "the grounds of such refusal, or in case the order of refusal shall be in any other respect erroneous or informal." But this section only applies to cases where there is a defect in the form of the order. It does not appear to me to allow the appellate tribunal to travel outside the ground of refusal stated, where that ground is formally stated.

Taking up here the order of the magistrates at Petty Sessions, we see that it is expressly grounded on certain grounds of refusal therein set forth—"the unsuitability of the premises from their locality, being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." Did the Quarter Sessions order vary this in any way? On the contrary, it purports to be a confirmation of the Petty Sessions order as it stands. The Court of Quarter Sessions had power to vary, affirm, or reverse the magistrate's order, and in this case they have affirmed it. The magistrates at Petty Sessions based their order on the fact that the applicant's premises were close to a school and place of worship. These are "the grounds of refusal" stated by them in their order; and that order has been affirmed at Quarter Sessions where the County Court Judge, and the magistrates with him, could only enter on the grounds so stated.

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The question then is, Were considerations such as these open to the magistrates under the words, "suitability of the premises"? The word "premises" admittedly has the very widest signification. It occurs all through the Licensing Code. I think it includes every spot over which supervision can range. The difficulty then is reduced to fixing the meaning of the word "suitability." Of course in the case of beer licenses, the Licensing Justices have now an uncontrolled discretion under the Act of 1882 (45 & 46 Vict. c. 34, s. 1). But this Act does not apply to spirit grocers' licenses with respect to which the limits of the Justices' jurisdiction are prescribed by the statutes to which I have already referred. In the view of the majority of the Judges in the Court below, "suitability of the premises" involves the consideration of all the surroundings, in fact all that was included in the Act of 1833 as regards public-houses where a new license is applied for, and this too (as I have pointed out already) in the case of a transfer, though in the case of the transfer of a public-house license a more restricted inquiry is under *Clitheroe's Case* (1), all that is open to the magistrates. Madden, J. (at p. 256), says:—"The term "unsuitability" is a compendious mode of expressing unfitness and inconvenience, and is, at least, as comprehensive." I think it is more comprehensive. If the construction put upon the section in the Court below be correct, I can find no limit to the Justices' jurisdiction short of an absolute discretion, and this it is admitted that they have not been given in the case of spirit grocers' licenses, and were not given in the case of beer licenses till 1882 (45 & 46 Vict. c. 34), notwithstanding the use of the very similar phrase "suitability of the premises for the purposes of such sale," which occurs in the section which prescribes the analogous certificate required before obtaining a license to sell beer by retail to be consumed off the premises (27 & 28 Vict. c. 35, s. 3).

On the whole, then, it seems to me that the legislation in the Act of 1833 affords an argument rather against than in favour of the decision of the licensing authority. To interpret "suitability of the premises," as they have done, would, as I think, include considerations not within the Act of 1833 at all, allowing a spirit grocer's application to be refused on grounds much wider than those open to be raised by an objector in the case of public-house, and that, too, in a case where only a transfer was sought.

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(1) Ir. R. 11 C. L. 412.

I express no opinion as to whether it would not be desirable that Justices at Licensing Sessions should not have power in a case of this kind to consider the proximity of a school or a church; but the question is whether no such ground being open till 1874, the jurisdiction then conferred opens up those considerations, and I do not think that it does. In some cases they have by statute an uncontrolled discretion; they have not yet got it by express legislation in the case of spirit grocer; but if the construction contended for be correct, I can assign no limit save discretion, which —though this might be desirable—I cannot find conferred.

I think the appeal should be allowed, and the conditional order for a *certiorari* made absolute; but inasmuch as new evidence might exist proper, to be submitted to the magistrates upon the question which, as regards the premises, it was competent for them to entertain and decide, and which they may not have considered, I think the case should be remitted to the magistrates for further disposal.

PALLES, C.B.:—

The order sought to be quashed was made by the Quarter Sessions, in the exercise of its appellate jurisdiction, upon the hearing of an appeal which they had jurisdiction to entertain. The order, therefore, cannot be quashed for a defect of jurisdiction, which does not appear upon the face of the order itself. The first question, therefore, is, to what extent the order of the Quarter Sessions incorporates the reasons stated in the order of the Justices. The latter order is, "the application refused unanimously, on the ground of the unsuitability of the premises, from the locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." The order of the Quarter Sessions is "that the order of the Court of Petty Sessions be affirmed, and the application of the appellant refused, on the ground of the unsuitability of the premises."

Now, if the order of the Quarter Sessions had terminated with the word "affirmed," the case would be too clear for argument. If the order of the Justices, which must state reasons, be bad upon its face, by reason of the insufficiency of the reasons the order of the Quarter Sessions simply affirming it must also be bad on its face. The subsequent words, however, are relied upon, as showing that the Quarter Sessions affirmed the order, not upon the grounds stated in the order itself, but upon the general ground of the unsuitability of the premises. If they did so, the order was not an affirmance; it was at least a variation, if indeed it did not amount in law to a reversal of the previous order, and a new order on new grounds. It is said, then, that "affirmed" must be read, not in the strict sense, but as "affirmed with a variation." I cannot agree in this. As the order has not been expressly varied, it cannot be deemed to amount to a variation unless the concluding clause is inconsistent with the whole order being a simple affirmance. Now, it is not inconsistent. The magistrates decided two propositions, one of law, and the other of fact, viz.—1, that as a matter of law, the fact that the premises were situated in the immediate neighbourhood of another public-house, and close to a school-house and place of worship, was an element which they were entitled to take into consideration in determining the suitability of the premises; 2, that by reason of this proximity of the public-house, school, and place of worship, the premises in the present case were, in fact, unsuitable. The affirmance of the order affirmed both of these propositions, and the necessary result of this affirmance was that the application of the grocer should be refused on the ground of the unsuitability of the premises. The addition, then, of the words "on the ground of unsuitability of the premises," so far from being inconsistent with the order being a simple affirmance instead of a variation, is not only consistent with such simple affirmance, but is indeed a necessary corollary from it.

I hold, therefore, that the order of the Quarter Sessions, by affirming the order of the Justices, incorporates and makes part of itself every word of that order, including the grounds stated therein.

So far for the matter of form; now, as to the substance. The question is, whether, in determining whether the premises were suitable, under the 37 & 38 Vict. c. 69, had jurisdiction to take into consideration two facts—(1) that another public-house was in the immediate neighbourhood; and (2) that the premises were close to a school and to a place of public worship? I am of opinion, that they had not. Until the Licensing Act of 1872 every grocer was entitled, as of right, to obtain an excise license for selling spirits not to be consumed elsewhere than on the premises, in quantities not exceeding two quarts. The 82nd section of that statute prohibits excise officers from granting a new excise license to any person who, at any time within the then next preceding two years, had been a licensed spirit grocer, or from granting to any licensed spirit grocer, upon the expiration of his license, a renewal thereof, unless upon a certificate "of the good character of such person, and the peaceable and orderly manner in which *his* business was conducted during the year next preceding the expiration of his former license."

This provision, it will be observed, did not prohibit the granting of a new license without a certificate to anyone who had not been previously licensed as a spirit grocer.

The concluding sentence of sect. 82 directs applications for certificates to be made in the manner prescribed by the Beer House (Ireland) Act, 1864, 27 & 28 Vict. c. 35. The certificate by that statute required, as a condition precedent to granting a license or transfer of a license for the sale of beer by retail, to be consumed elsewhere than on the premises, is a certificate of the good character of the person applying for same, and "the suitability of the premises *for the purpose of such sale.*" By the Licensing (Ireland) Act, 1874, sect. 9, the provisions of sect. 82 of the Licensing Act of 1872 are extended to the transfer of excise licenses, and it is enacted that those provisions shall extend and apply to all such transfers and grants when made to any other persons. Had the section stopped here, its effect would have been to require a person who had not been previously licensed to obtain a certificate as to the peaceable and orderly manner in which *his* business was conducted during the preceding year, a certificate which would have been impossible, as *ex hypothesi he* had not carried on any such business. The section, therefore, proceeds to enact, "that in the case of a new excise license or transfer of an excise license under this section, the certificate shall be to "the good character of the person applying for same, and to the suitability of the premises." Thus, in the case of a person who has not been previously licensed, a certificate as to the suitability of the premises is substituted for that of the peaceable and orderly manner in which the business had been conducted.

Were there no other material enactments than those which I have mentioned, I think it clear that, "suitability of the premises" in the latter section would have meant "suitability of the premises for the purpose of sale."

There are also, however, in the code of statutes regulating such houses, many provisions, such, for instance, as sections 83 and 84 of the Act of 1872, which prohibit spirit grocers from doing certain acts which the Legislature considered would be evasions of the law prohibiting spirits from being consumed on the premises; and there are other provisions which authorise constables to enter the spirit grocers' premises at any time at which they are either kept open for sale (8 & 9 Vict. c. 64, s. 2), or during which the sale of liquors is prohibited therein (sect. 87 of Act of 1872). Again, section 85 of the Licensing Act of 1872 prohibits any internal communication between the premises of the spirit grocer and any other premises which are used for public entertainment or resort, or as a refreshment-house. All these provisions affect the meaning of "suitability of the premises," under sect. 9 of the last Act, and, upon the whole legislation, I am of opinion that that expression means suitability for the business of the sale of spirits, to be consumed elsewhere than on the premises, being conducted therein in a peaceable and orderly manner, and so that the premises shall be reasonably subject to such entry and inspection by the police as is authorized by law. Can the number of licensed public-houses in the neighbourhood, or the proximity of the premises to a school or church, affect this suitability? The subject-matter which is to have the character of suitability is not "the neighbourhood" but "the premises."

What, then, is involved in the expression "premises," the subject-matter of the suitability? There is, 1st, the structure itself; 2nd, the place upon which that structure is erected. The place may be unsuitable for many reasons, as, for instance, because, from the nature of the approach to it, it might be impossible, or difficult, for the authorities to reach it, without being open to view for such a time as would enable the spirit grocer to remove, before their arrival, the evidences of any prohibited or otherwise illegal act which might immediately previously have been committed therein. Thus, it will be observed, I do not hold that the word "suitability" excludes all considerations of locality. It includes everything arising from locality which prevents the business being carried on in a legal, peaceable, and orderly manner, and subject to legal police supervision; but, in my opinion, it excludes all considerations arising from neighbourhoods which do not affect the premises themselves. In other words, it excludes the fitness of the neighbourhood for a peaceable, orderly, and well-supervised grocer's shop.

It is said that there is no reason why the Legislature should have intervened to secure suitable premises for the sale of spirits any more than for the sale of tea, so far as the interests of the trade or the convenience of the customer are concerned. I venture to respectfully differ from this opinion. But the construction I adopt extends the reason for interference to securing provision that the law regulating such licensed houses shall be observed, and the nature of the subject-matter, as well as the provisions of the Acts themselves, afford ample ground for the conclusion that in relation to this object the structure and site of the house were matters of moment. As the governing provision is that the spirits sold shall be consumed elsewhere than upon the premises the fittings of the shop or place in which they are sold should be such as to render public and open to view the part of the shop in which the sale takes place, and to render it impossible, or at least unlikely, that illicit drinking should be secretly carried on therein. Thus, there is ample scope for the effective operation of the section, read according to what I conceive to be its grammatical construction. This, according to my view, is the construction adopted by the Lord Chief Justice, although throughout the argument his judgment had been treated as altogether excluding considerations of site. There are, no doubt, some passages in that judgment which, if taken *per se*, might seem to be so limited, but there are others which plainly show that he considered that such matters, had they been proved to have existed, might be taken into consideration for the purposes I have mentioned: for instance, in page 276, his Lordship says:—"There is not a single word in any affidavit . . . or any suggestion that any difficulty, by reason of access, would prevent the place from being thoroughly supervised by the police."

The argument mainly relied on was that 3 & 4 Wm. 4, c. 68, s. 4, authorizes objections to applications to publicans' licenses, on the grounds not only of the character, misconduct, or unfitness of the applicant, the unfitness or inconvenience of the house or place, but also of the number of previously licensed houses in the neighbourhood." It is said that "suitability of the premises" in sect. 9 of the Act of 1874 is, in substance, the same as "unfitness or inconvenience of the house or place" in this section; and that a construction has been placed upon the latter words which we are bound to now apply to the new expression, "the suitability of the premises." I admit that if an expression in one Act, which by construction has obtained a particular meaning, is repeated in a later Act *in pari materiâ*, the same expression in the later Act should, *primâ facie*, obtain the construction it had received in the former Act. But that principle has, in my opinion, no application to the present case. The words are not the same, and, even were their import similar, the fact that the Legislature, instead of repeating the former expression, has used new words affords a strong argument in favour of the non-application to them of the meaning placed upon the different words of the previous legislation.

Further, the purview of the objections in both sections is different. The words in the 9th section of the Act of 1874 point to something personal in the grocer, or inherent in his premises. On the other hand, the Act of 1833 plainly involves considerations extrinsic to either the applicant or his premises, viz. the number of previously licensed houses in the neighbourhood. This shows that, under the Act of 1833, the neighbourhood is to be considered in respect of at least one matter, and the fact of its having to be taken into consideration at all may well affect the standpoint from which the Legislature viewed the words "house or place." In other words, the introduction of this element opens an argument that the unfitness or inconvenience of the premises is to be determined, having regard not only to the customers and the police, but also to the interests of the neighbourhood.

For this reason, I conceive that the comparison of the section we have to construe with sect. 4 of the Act of 1833, instead of derogating from, rather strengthens the view which I have arrived at from its grammatical construction.

Upon the whole, I am of opinion that the Justices had not authority to refuse the certificate upon any of the grounds mentioned in their order, and that consequently the conditional order for a certificate should be made absolute, and that there should be a *mandamus* to the Quarter Sessions to enter continuances and re-hear the appeal.

FitzGibbon, L.J.:—

It is in a sense useless for me to state my reasons for thinking that the order of the Queen's Bench Division should be affirmed: but the parties are entitled to such a statement, at least in general terms. I concur with, and I venture to adopt, the judgments of Mr. Justice Madden and Mr. Justice Gibson. In my opinion we are asked to intrude into a jurisdiction which we do not possess, but which belongs exclusively to the licensing authority, in a case where the Petty Sessions and Quarter Sessions have each exercised that jurisdiction upon evidence which they were entitled to consider; and each of those two authorities has made an order which is, in my opinion, good in form. I have the further objection to the order which this Court is about to pronounce, that it appears to me to be inconclusive; because, when the matter goes back again to the Licensing Magistrates, if, upon hearing any further evidence that may be given, they remain of the same opinion, and honestly consider that the evidence affords sufficient grounds for saying that these premises are unsuitable then the only result of these proceedings will have been to point out to the magistrates how to frame their order so that the High Court will have no jurisdiction to interfere with it.

I agree with Mr. Justice Madden when he says:—"The Magistrates, both at Petty and Quarter Sessions, acted within their jurisdiction, under the 9th section of the Act of 1874, and the orders under consideration are good." It would be only quibbling to decide the case on any difference of form between these two orders, because I am entirely satisfied that the reasons

Fitz Gibbon, L.J.

which influenced the Court of Petty Sessions were the same which influenced also the Court of Quarter Sessions, and that the only difference between the orders is that the first gives the particulars, as it were, of the grounds, which the second states only in general terms, following the words of the Act of Parliament. It would be unjust to maintain the order at Quarter Sessions as good upon the face of it, if not prepared to defend the legality and sufficiency of the reasons given in the order of Petty Sessions.

What is the jurisdiction which is vested in the Licensing Authority, and with which we have no right to meddle? No one can question Mr. Justice Madden's statement of the law:—"Either the Justices could look beyond the house itself to its surroundings, or they could not. If they could not, the order (in the form in which I assume it to have been made) is bad. If they could, this Court cannot inquire into the justice of their decision, or into the sufficiency of the evidence upon which they acted." For our purpose, the Justices have to determine, on an application for a spirit grocer's license, in the words of the Licensing Act, 1874, sect. 9, whether they will give a certificate "to the suitability of *the premises*." We find the definition of "premises" in the Licensing Act, 1872, sect. 77, which enacts that the word shall include "house or place," as defined by 17 & 18 Vict. c. 89, sect. 12. By that definition "the words 'house or place' shall be construed to mean, or to extend to every room, closet, cellar, yard, stable, out-house, shed, or any other place whatsoever, of belonging or in any manner appertaining to such house or place." I think, therefore, that "premises," in the Act of 1874, sect. 9, means only what is meant by the same word in the notice over the door, as to consumption of intoxicating liquor "off *the premises*." I give the term its most restricted meaning, and I further think that the words "*house* or *place*," where they occur, have no wider meaning, viz.: that portion of the earth's surface, with the buildings upon it, which is covered by the license, and on which the sale of liquor may lawfully take place under the license. Accepting this construction, and admitting that the word "premises" does not include any of the "surroundings," as they have been called, the real question is whether "suitability" can be determined by considering anything except what stands upon the licensed site.

I did not think that any doubt could have been thrown on the meaning of the Lord Chief Justice in dealing with this question. In his judgment he defines his meaning several times, and he sums it up in these concluding words:—"The expression 'unsuitability of premises' is confined to considerations *affecting structure*." There he stops, and the rest of the sentence is covered by a dash—"structures in relation to proper *accommodation* for the public, in relation to the proper conduct of the business *in the premises* proposed to be licensed, and to all considerations affecting site so far as it affects *structural fitness upon the site*, and access to the premises *by the customers*." His only reference to supervision by the police is where he says that no evidence was given upon that subject before the magistrates, and that it had not been entered into by them at all. The Lord Chief Justice says:—"The natural and ordinary meaning of the words is, in my judgment, whether the premises are suitable for the sale of spirits, and not whether the sale of spirits is suitable for the surroundings." I have tried to understand this distinction, and I confess I can not clearly see how it could be determined whether any structure was suitable for any purpose, without considering whether the purpose was suitable to the structure, or taking *where it is* into account. In other words, can the sale of spirits be "suitable," if it takes place in a structure which is in a situation which renders the sale of spirits *there* unsuitable?

The Lord Chief Justice, in another passage, says that the question is "whether the house and premises are unfit and inconvenient for the business, and not whether the business done in the house and premises is unfit or inconvenient for the surroundings." I hold that, in the ordinary use of language, a business cannot be conducted fittingly or conveniently in a place where that very business is itself unfit or inconvenient for the surroundings; but the judgment of the Lord Chief Justice is entirely consistent and entirely logical, if we read it as deciding that the one and only thing that the magistrates can take into account is the structural fitness of the premises, wholly regardless of where they stand, or of anything that goes on, or that exists, outside them.

Is there any reason or analogy for such a construction of the statute? It is graphically pointed out by Mr. Justice Gibson and Mr. Justice Madden, that so far as structural fitness is concerned, almost any structure that is a shop at all would be suitable for the sale of small quantities of whiskey in bottles, whereas the moment the nature of the trade is taken into account, we see at once that the suitability of the *site* depends on many considerations, all relating, not to the mere structure, but to the surroundings. In granting licenses for public-houses, is the same construction to be adopted? Is the point of view of the customer to be the only one regarded? I cannot understand what structure suitable for the sale of tea, or provisions, or any other goods sold in small quantities, could be held unsuitable for the sale of whiskey to be carried away in small quantities. I admit that until 1874 "a new beginner" in the spirit-grocer's business could open his shop, and carry on his trade *anywhere*, but only for a certain time; and after the experiment had been tried for a year, as it were, he was obliged to satisfy the magistrates that his premises were suitable. But does not the very fact that Parliament interfered, and restricted the first establishment of a spirit grocer's shop to suitable premises, show that it was intended to impose some substantial restriction in some public interest, analogous to the restrictions already imposed upon the kindred trade of the publican? Of all the decisions in this country and in England, *Clitheroe's Case* (1) goes farthest in placing a specific limitation upon the judicial discretion of the licensing authority, and anyone who reads that case can see how far the decision was due to the natural repugnance of Courts of Justice to allow existing and valuable property to be capriciously or arbitrarily annihilated; no such argument can apply to the first establishment of a business not previously licensed. In *Sharp* v. *Wakefield* (2), a case similar in its facts, and decided upon analogous though not identical statutes, with *Clitheroe's Case* (1), the discretion of the magistrates was held by the House of Lords in England absolute: that case has been followed by *Freer* v. *Murray* (3), and those decisions seem to me to make it most unlikely that the Legislature contemplated any refined and metaphysical limitations upon the exercise of the discretion which it vested in the licensing authority.

(1) Ir. R. 11 C. L. 412. (2) [1891] App. Cas. 173. (3) W. N., 1894, p. 114.

Next I ask, *cui bono*—in whose interest—is this discretion conferred, and for whose protection is it to be exercised? I agree in all that has been said by Mr. Justice Madden and by Mr. Justice Gibson, to show that the interest of the public ought to be first considered by the magistrates. I deny altogether that "suitability of premises" is to be discussed only as to the convenience of those who want to sell, or to buy, small quantities of intoxicating liquor. I also deny altogether, if we once go outside the actual structure of the premises, that we are to limit our consideration of their suitability to the purpose of supervision by the police. Where is the reason to prefer the convenience of the policeman to that of the neighbour, or of the passer-by? In the course of the argument I put the case of an established school or place of worship, approachable only through a passage, at the entrance of which it is proposed to open a spirit grocer's shop. The class of persons who come to buy small quantities of spirits across the counter are not those through whom parents would send their children, or worshippers would care to pass, on their way to or from school or church. Such an establishment might mean the destruction of the school, and would certainly interfere with the convenience of those frequenting the place of worship. The more "suitable" the structure of the grocer's shop was for the sale of spirits to its customers, the more ruinous might its opening in such a position prove to the neighbouring institutions. I decline to force the magistrates to give a certificate of the suitability of premises, merely because they are suitable for the business of one man, if they honestly think that carrying on that business in that place will injure the property, or affect the interests, or even be unsuitable to the convenience, of many others. This is no new principle: it is as old as Comyn's Digest, where we find that carrying on a publican's business in an unsuitable place may even amount to a nuisance. Is the Licensing Act of 1874 to have a construction put upon it which might force the magistrates to give a certificate that premises were suitable, although the establishment of the proposed business in these premises might be a nuisance at Common Law, owing to their situation and surroundings? It appears to me that the real subject-matter for the discretion of the Justices is the house and all its surroundings—the buildings, site, situation, and neighbourhood; and when they have considered all these matters, it is for them to say upon the evidence, whether they are satisfied that the premises are suitable for the retail sale of spirits across the counter; if they come to the conclusion that the place is not suitable, it is their duty to refuse the license.

I shall refer to but one authority, which, with all respect, seems to me to be strangely misapprehended, when the language of Mr. Justice Lush is quoted in support of the opinion of the Lord Chief Justice in this case. The head-note of the *Queen* v. *The Lancashire Justices* (1) is this:—" On an application under 32 & 33 Vict. c. 27, for a certificate for a license to sell beer to be consumed on the premises, in respect of a house not previously licensed, the Justices have the same discretion as to granting or refusing the certificate as they have in granting or refusing a license under 9 Geo. 4, c. 61; and they may and ought to take into consideration the number of houses in the neighbourhood already licensed, and refuse the certificate if they think an additional beer-house *unnecessary or undesirable in the interest of the public.*" We are now laying down that, under the Licensing Act of 1874, the Irish magistrates must shut their eyes to the very matter which it was held that the Justices of Lancashire were bound to consider. When we look into the case, it becomes stronger, because the Act there considered did not at all define or indicate the interest of the public as a subject for consideration. Mr. Justice Lush (at p. 99) says that it is "obvious that the words relied on by the appellant point not merely to the merits of the applicant, but must be read in a wider sense, as referring to the merits of the application; and they authorize, and therefore *by implication require* the Justices to govern their discretion in granting or withholding the license, by reference not only to the qualification of the person applying and to the suitableness of the house, but to other considerations also. Those considerations must include the nature of the locality, the population, the number of houses already licensed, and all other circumstances bearing on the question, whether it is fit and proper,

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(1) L. R. 6 Q. B. 97.

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1894.

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v.
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Tyrone.

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in the interest of the public, for whose benefit these Acts are passed, that an additional license should be granted." He then takes up the Acts 32 & 33 Vict. c. 27, and the 9 Geo. 4, c. 61, and points out the cases in which the magistrates are expressly forbidden to take into account any but certain specific grounds of objection, and he concludes :—" The necessary implication from these provisions is that under the 9 Geo. 4, and also under the recent Act, in cases not within these two clauses (of which the present is one) the certificate may be refused, though the applicant is of good character, though his house is not disorderly, though he has not forfeited or been adjudged unworthy of a license, and though he and his house are duly qualified."

It appears to me that this is a clear and strong decision that the interest of the public must be looked to, and that it includes the consideration of the surroundings, unless the discretion of the magistrates is expressly limited.

As to the Acts, 3 & 4 Wm. 4, c. 68, section 4, and 27 & 28 Vict. c. 35, section 3, I think that the meaning of their language does not differ from that of the section on which our question turns. Having pointed out, as I have done, that "premises" includes "house and place," it appears to me that "fitness or convenience" . . . . is the same as "suitability." A thing cannot be fit or convenient if it is unsuitable: if it is suitable, it must be fit and convenient. Therefore it appears to me that the only difference between "suitability of the premises" and "fitness and convenience of the house or place," is the substitution of four words for eight. In the case of a "beer-house," regard is to be had to "the suitability of the premises for the purpose of such sale." But where is the reason for saying that "suitability for the purpose of such sale" means suitability with regard to the interests of buyer and seller only? Is a crowded neighbourhood "suitable" for a powder-mill? If not, why not? Because the trade must be suitable to its surroundings, and not merely the building suitable for the trade.

The Common Law, as stated in Comyn's Digest, and the Statute Law, as expounded in *The Queen* v. *The Justices of Lancashire* (1), are against the decision that inconvenience offered and injury done, to the community in general, or to the neighbour in particular, are not to be considered by the Justices. Accordingly, it appears to me that the magistrates were right in taking into account what were the buildings round the place for which Marshall sought the certificate, and that they were entitled to hold that with a school on one side, and a place of worship on the other, they were not suitable for the sale of drink in small quantities. We have no jurisdiction to entertain any question of "more or less." Either the school or church are to be disregarded altogether, or they are to be considered. If considered, their precise position, and the effect of the spirit shop upon them, is for the magistrates. A different question might arise as regards the proximity of the public-house, if it was the only ground. It does occur to me that when one specific ground of objection, such as "the number of previously licensed houses" is mentioned in a statute in *pari materia*, the same thing ought not to be included under the more general head of "suitability of premises." Still there may be cases in which premises would be rendered unsuitable for the sale of spirits by retail under an "off license," by their immediate proximity to a number of public-houses, and thus the matter might become a legitimate subject for consideration by the Justices; but the existence of this reason cannot affect the duty of the magistrates to consider the other question as to the school and the church, nor can it affect the still broader question of the interests of the public, and the order, if based upon other good and sufficient grounds, is not to be quashed merely because it mentions one that is doubtful and insufficient.

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(1) L. R. 6 Q. B. 97.

In the last passage that I shall quote, the Lord Chief Justice asks:—"Is it to be supposed that by the condition imposed as to suitability of the premises by the Act of 1874 the Legislature meant such a wholesale change in the law as to invest the magistrates with a discretion not only with reference to structural arrangements necessary for the accommodation of the public, and the proper conduct of the business, but also in reference to the external conditions as regards surroundings, and to the moral and æsthetic considerations that might arise in respect of these surroundings, and which considerations might fluctuate not only according to the various idiosyncrasies of different magistrates but with the varying aspects and conditions of the physical surroundings themselves and their occupants?" I ask, is it to be supposed that by the change in the law, which was undoubtedly made, the Legislature meant to limit the discretion of the magistrates to the physical construction of grocers' shops? Even in that limited field, various idiosyncrasies, and varying aspects and conditions, might lead to fluctuating decisions. But the magistrates form the tribunal by law, and what is placed under their jurisdiction is the determination of the suitability of the premises, having regard to all about them, and to the interests of all persons concerned. The question is not left to their *absolute discretion*, but it is left to their *exclusive jurisdiction;* and, if there be any evidence to sustain the exercise of their jurisdiction, we have no right to meddle. If there has been a wrong decision it is not ours.

Here the certificate was refused by reason of locality. I cannot separate locality from structure, in determining whether a house is suitable or unsuitable to the purpose for which it is used. The Lord Chief Baron admits that locality must be taken into account for one purpose, namely, for police supervision. Access of the customers involves locality too. But I differ from the other members of the Court in putting such a limit on the consideration of locality as to confine it to the policeman and the purchaser. In the interests of the neighbours and of the public, I hold that proximity to the school, and place of worship, were legitimate subjects for the magistrates in the consideration of locality, that they affected the suitability of the premises, that the orders are right, that the grounds stated were within the jurisdiction of the magistrates and that we have no business to meddle with their decision.

For these reasons I am strongly of opinion that the decisions of Mr. Justice Gibson and Mr. Justice Madden were right, and that the order of the Queen's Bench Division should be affirmed.

BARRY, L.J.:—

I concur with the Lord Chancellor and the Lord Chief Baron. If we had power to legislate on the subject before us one could not but feel impressed with the views expressed by Lord Justice Fitz Gibbon; but I am of opinion that if this Court acceded to that view it would invest the magistrates with a jurisdiction which

I think was not within the contemplation of the Legislature in passing the Licensing Act of 1874. That Act imposed, for the first time, a burden on grocers seeking a spirit grocers' license by requiring them to obtain a certificate from the magistrates as to the suitability of the premises. The provisions of the Act so far as it imposes a burden not previously existing should be construed strictly, and I cannot hold that under the words "certificate as to the suitability of premises" the Legislature meant to invest the magistrates with so wide an authority as Lord Justice FitzGibbon suggests.

The only doubt I entertain in the case is whether we should send the case back again to the magistrates. It appears by the records of the Court of Queen's Bench that in the year 1877 this very bench of magistrates defied the order of that Court in reference to these very premises. I regret that the matter will not be conclusively settled by our order.

Solicitor for the appellant: *T. H. Risk.*
Solicitor for the respondents: *T. C. Dickie.*

G. Y. D.

MORE O'FERRALL, Tenant; QUIRK, Landlord (1).

Land Com.
1894.
Nov. 9, 24.

Redemption of Rent (Ireland) Act, 1891 (54 & 55 *Vict. c.* 57)—*Demesne lands.*

Where a tenant has impressed a holding with the character of demesne it is excluded from the fair rent provisions of the Land Acts, though the lands may never have been demesne of the landlord before the Court.

***Borrowes* v. *Colles* (28 Ir. L. T. R. 41) followed.**

The facts of the case are fully stated in the judgment of Bewley, J.

White, Q.C., and *Henry Richards*, for the tenant:—

The word "demesne" in the Act is used in the popular and ordinary sense: *Pratt* v. *Gormanstown* (2), *Borrowes* v. *Colles* (3), and *Allen* v. *Grogan* (4).

R. E. Meredith, Q.C., and *Wakeley*, for the landlord, relied on *Pratt* v. *Gormanstown* (2); *Borrowes* v. *Colles* (3); *Allen* v. *Grogan* (4); *Magner* v. *Hawkes* (5).

Bewley, J.:—

Nov. 24.

The proceedings in this case were instituted by the tenant under the Redemption of Rent (Ireland) Act, 1891, for the purpose of redeeming a perpetual yearly rent of £207 16*s.* 6*d.*, created by a fee-farm grant, dated the 17th June, 1872, or in the alternative to have a fair rent fixed in default of obtaining the grantor's consent to the redemption. The grantor did not give the prescribed consent, and the case having come before a Sub-Commission on the hearing of the application to have a fair rent fixed, the tenant's originating notice was dismissed on the ground that the holding is demesne land.

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(1) Before Bewley, J., and Fitzgerald, Q.C., and Lynch, Commrs.

(2) [1894] 2 Ir. R. 557.

(3) 28 Ir. L. T. R. 41.

(4) 32 L. R. Ir. 179.

(5) *Ibid.* 285.

The tenant, Mr. Ambrose More O'Ferrall, is a deputy-lieutenant of the county of Kildare, and the owner of extensive estates in four or five counties in Ireland, but if the holding is not excluded from the operation of the fair rent provisions of the Land Acts, he is entitled, to use an expression of Lord Justice Barry in *Pratt* v. *Gormanstown* (1), "to pose as an over-rented farmer," and his social position or the extent of his property cannot in any way affect the decision of this Court.

The holding, which contains 142 statute acres, is situate in the county of Kildare, near to Moyvalley, and was originally let, with other lands, to Mr. Richard More O'Ferrall (the father of the present tenant) by Mr. Eugene Quirke by a lease, dated the 28th January, 1840, for a term of ninety-nine years, at the yearly rent of £207 16*s.* 6*d.* Mr. More O'Ferrall was then living in the large mansion-house of the demesne of Balyna, which immediately adjoins this holding. This demesne contains about 500 acres, and the present holding was apparently an ordinary farm, intersected by a public road, now closed, and divided into a number of fields, twelve or thirteen of which lay between the road and the boundary of Balyna demesne. Mr. More O'Ferrall proceeded to remove and level all the internal fences of these twelve or thirteen fields, and incorporated the entire portion north of the public road as well as other lands lying to the west with the original demesne of Balyna. He also planted a handsome avenue of trees, considerably over half-a-mile in length, from the boundary of the old demesne to the north-eastern extremity of that part of the present holding lying north of the public road. He contemplated, it is said, making a road or drive from Balyna House to the Enfield road between these trees, but this was not carried out owing probably to the construction of the Midland Great Western Railway. The trees, which are elm and lime, planted in a double row on each side, with a grassy space 15 yards wide in the centre, must obviously add greatly to the beauty of Balyna demesne, and the front of the mansion-house or part of the lawn close to it commands an uninterrupted view between the trees that cannot fail to be striking. Where the lines of the trees intersect the western boundary of this holding there is no fence of any kind, and cattle can range at pleasure from the holding to the adjoining lands.

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(1) [1894] 2 Ir. R. 557, at p. 572.

A comparison of the last revision of the Ordnance map of the locality with that issued after the survey of 1837 shows clearly the changes that have been effected in the physical features of the present holding since it came into Mr. Richard More O'Ferrall's hands.

Upon the evidence, whatever the legal consequences may be, it is manifest that at least a very substantial part of the present holding has been actually incorporated with and now forms part of Balyna demesne.

In 1869, after Mr. Ambrose More O'Ferrall, the present tenant, had attained the age of 21 years, a family settlement, dated the 26th October, 1869, was executed by Mr. Richard More O'Ferrall, re-settling the extensive family estates; and by that deed Mr. Richard More O'Ferrall assigned his interest in this holding, under the lease of the 28th January, 1840, together with his interest in other adjoining leaseholds, to trustees upon trusts, corresponding to the uses of the freehold estates thereby settled in strict settlement.

In the year 1872, Mr. Richard More O'Ferrall paid to Miss Ellen Mary Quirke, the present landlord, the sum of £400 for the purpose of acquiring a perpetual estate in the present holding, and by a fee-farm grant dated the 17th June, 1872, the holding was granted to him by Miss Quirke, in fee, subject to the perpetual yearly rent of £207 16*s.* 6*d.* Mr. Richard More O'Ferrall duly made and executed his will, dated the 15th April, 1876, and thereby devised *inter alia* the lands granted by the last-mentioned indenture to the trustees of the settlement of the 26th October, 1869, to hold to the same uses, and upon the same trusts as were thereby declared of the fee-simple lands thereby settled. The testator died on the 27th October, 1880, and Mr. Ambrose More O'Ferrall, under the family settlement referred to, is now entitled to the settled estates, including the present holding, as tenant for life. Thus the holding was dealt with by Mr. Richard More O'Ferrall in precisely the same manner as the original demesne lands of Balyna, and the other family estates, and is now subject to the same limitations.

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The present case is undistinguishable in principle from *Borrowes* v. *Colles* (1), where Major Robert Higginson Burrowes, who is also a gentleman of property and position in the same county of Kildare, sought to avail himself of the provisions of the Redemption of Rent Act in respect of a fee-farm rent issuing out of a holding containing 81 statute acres annexed by him to his demesne.

In that case I held that where a tenant has impressed a holding with the character of demesne, it is excluded from the fair rent provisions of the Land Acts, though the lands may never have been the demesne of the landlord before the Court, or any of his predecessors in title. This appeared to me to follow from decisions of the Court of Appeal in recent years on the subject of demesne lands, but having regard to the judgments of two of the members of the Court of Appeal in *Pratt* v. *Gormanstown* (2), it is, perhaps, desirable that I should give the reasons for my opinion somewhat more fully than I did in *Borrowes* v. *Colles* (1).

In *Pratt* v. *Gormanstown*, the Lord Chancellor says, at p. 558:—"I think the question is a most important one, whether land can be demesne land within the meaning of the excepting clause of the Act of 1881, unless when there is a landlord who claims them as his demesne, and asserts his right to resume them as such without the incident of a fair rent being fixed on them. I cannot find any case which has gone so far; as I think this case can be decided without laying down any direct principle, I express no opinion upon it."

And at page 571, Barry, L.J., says:—"The strong inclination of my opinion at present is, that a holding to be demesne land, within the exception of the Act, must be (or have been) demesne land of the landlord against whom the fair rent is sought to be fixed, or his predecessors in title."

The expression, "demesne land," in the Landlord and Tenant (Ireland) Act, 1870, and the Land Law (Ireland) Act, 1881, is undoubtedly, used in a popular, and not in a technical sense. In such untechnical sense it is found in many other modern statutes, some prior, and other subsequent to those referred to.

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(1) 28 Ir. L. T. R. 41.

(2) [1894] 2 Ir. R. 557.

In "The Leasing Powers Act for Religious Worship in Ireland, 1855" (18 & 19 Vict. c. 39), powers are given by the 3rd section to make leases of lands in Ireland, not exceeding, in the whole, five acres for religious purposes, excepting, however, "the mansion house and demesne lands, or parks, plantations, gardens, orchards, or pleasure grounds and appurtenances belonging to or usually occupied with such mansion house."

The Settled Estates Act of the following year (19 & 20 Vict. c. 120)—an Act applicable to both England and Ireland—by its 32nd section empowers tenants for life to grant leases for 21 years of the settled estates, "except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith." The Landed Property (Ireland) Improvement Act, 1860 (23 & 24 Vict. c. 153), by its 30th section, excepts from the leasing powers given by the Act "Any mansion house or demesne lands." A similar exception from the leasing powers given by the Landlord and Tenant (Ireland) Act, 1870, is found in section 28, sub-section 2; and in the Leases for Schools (Ireland) Act, 1881 (44 & 45 Vict. c. 65), passed in the same session as the Land Act of 1881, certain leasing powers are given which, however, are not to extend to "the mansion house and demesne, or pleasure grounds usually occupied with such mansion house." The 15th section of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), is preceded by a sub-title, "Mansion and Park," and enacted that, "Notwithstanding anything in this Act, the principal mansion house or any settled land, and the demesnes and other lands usually occupied therewith," should not be sold or leased by the tenant for life without the consent of the trustees of the settlement, or an order of the Court. This section was repealed by the 10th section of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), which also follows a sub-title, "Mansion and Park," and sub-section 2 provides that "notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park, and lands (if any), usually occupied therewith shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement, or an order of the Court."

The word "demesne" is frequently used in Ireland where the

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word "park" would be employed in England; and whether these two words, in their popular signification, are co-extensive in meaning or not, it is a matter of common knowledge that what would be called a gentleman's park in England is spoken of as a demesne in this country. The demesne or park attached to a mansion house has, as a rule, certain physical features by which the character of at least portion of it can be recognized. Plantations, exterior boundary walls, ornamental timber, gravelled drives, lawns, gardens, and pleasure grounds are the principal *indicia* of demesne lands, all of which, however, need not co-exist in every case; but a large part of a demesne may be of a wholly unornamental nature, and its demesne character may be capable of ascertainment by the history of its user and not by inspection. If such part be ordinarily occupied and enjoyed by the owner along with the mansion house, it will not be the less demesne land because it is in tillage, and not distinguishable in appearance or treatment from an ordinary farm.

Most of the earlier cases of demesne land that came before the Courts after the passing of the Land Act of 1881 were those in which lettings had been of portions of land previously occupied by the owner of the estate in connection with his mansion house: *Griffin* v. *Taylor* (1) is a case of this nature. None of the Judges attempted to give an exhaustive definition of what was demesne land within the meaning of the Land Act of 1881, and I take Lord Justice Fitz Gibbon's judgment as merely dealing with the common type of demesne land case then before the Court, and laying down that a holding must be within the exception of demesne land, within the untechnical meaning of the Land Acts, whenever it is fairly shown that lands having been previously demesne have been continuously let under circumstances showing that the landlord intended at some time to resume possession of them with the mansion house, or at least intended to leave it open to himself or his successors to do so.

Moore v. *Batt* (2) appears to me to be an entirely different class of case. The holding in that case, which was called Newgrove, had been undoubtedly demesne land when it and the estate of which it formed part were the property of Captain Daniel McNeill. In 1824 the entire was purchased by Mr. Narcissus Batt of Purdysburn, and was conveyed to him by deed, dated the 1st July, 1824, in consideration of a sum of £23,000. Purdysburn, which then was, and still is, the seat of the Batt family, is situate in the county Down, within less than two miles from Newgrove, and is one of the finest demesnes in the county, with a large and handsome mansion house suitable in character. Newgrove House was not occupied at any time by any member of the Batt family, but was let from time to time with the offices, garden, and grounds for short periods to several persons in succession. The greater portion of the residue of the holding was in grass, and was used principally for the grazing of Mr. Batt's cattle, or of cattle taken in for the grazing season. Eventually, by a lease dated the 24th June, 1840, the holding was demised to Mr. Francis W. Heath for three lives, two of which are still in being, or for sixty-two years, at a rent of £325. The holding was described in the lease as "the mansion house, offices, demesne and farm commonly called and known by the name of 'Newgrove,'" and the lease contained covenants which, in the opinion of the Court of Appeal, showed an intention to keep up the demesne character of the place. When the case came before the Land Commission I took the same view of demesne land as has been suggested by Barry, L.J., in *Pratt* v. *Gormanstown* (1), in the passage I have already cited from his judgment, and being of opinion that at the date of the lease to Francis W. Heath, the lands and house were in no sense the demesne and mansion of the lessor, or the Batt family, and that in any case the length of the term granted negatived any intention of resumption, I held that the lands were not demesne within the meaning of the Land Acts. The Court of Appeal, however, were of a contrary opinion, and their decision appears to me to be largely founded on the physical character of the lands constituting the holding. The lands were such as came under the description of demesne lands, and were demised as such; and one of the members of the Court stated that he thought the holding consisted of the *demesniest* of demesne lands.

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(1) 16 L. R. Ir. 197.

(2) 32 L. R. Ir. 68.

(1) [1894] 2 L. R. Ir. 557.

In *Magner* v. *Hawkes* (1) the Court of Appeal held that lands might be converted by a middleman holding under a lease for a long term of years into demesne, as against a sub-tenant; and at p. 304, the Lord Chief Baron, in his clear and forcible judgment, observed that lands could not be demesne within the meaning of the Act subjectively, and that if the holding is not demesne *quoad* everyone, it cannot be demesne at all; and proceeds in these words:—"The right to have a fair rent fixed is a right given to the tenant in occupation of such lands as at the passing of the Act answered a particular description; and although, whether they answered that description, must usually depend upon the acts of particular persons, the lands are, according to the nature of those acts, either brought within or excluded from the Act not *quoad* those particular persons, but as to all persons having estates therein. Of two tenants for short terms of years holding under the one landlord, one may have sublet parcel of his holding, 'wholly or mainly for the purpose of pasture,' whilst the other may have let part of his holding without such limited purpose. The head landlord may not have done any act whatever in relation to either holding, still one subtenant may, and the other may not, have acquired rights under the Act against that head landlord. So, too, of two tenants of a common head landlord, one may, and the other may not, have constituted his holding demesne, and then each may have sublet; in my view in such case the subtenant of one might have no right, and the subtenant of the other might have a right under the Act against the common head landlord."

None of the members of the Court of Appeal, so far as I can ascertain from the report, dissented from this lucid statement of the law, though they may not have expressly assented to it, and Barry, L.J., who was the last member of the Court to deliver judgment, though, no doubt, guarding himself against laying down a definition of what should be demesne lands within the meaning of the Act does not notice these views of the Lord Chief Baron, and apparently based his judgment on the physical character of the place and its user.

The next case of importance on this subject is *Spencer* v.

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(1) 32 L. R. Ir. 285.

Tedcastle (1), where the Court of Appeal held a demise for lives renewable for ever, or a fee-farm grant of demesne lands did not deprive them of their character as between landlord and tenant.

At page 415, Walker, C., in dealing with the argument that the word "demesne" in the Land Acts indicated something that the landlord has power to resume, stated:—"The desire to preserve the right of resumption where it existed may have been the motive that influenced the Legislature to exclude 'demesne lands' from the Acts of 1881 and 1887. Both those Acts were conversant with tenancies yearly or leasehold at the expiration of which, previous to the passing of those Acts, the landlord in the case of such lands would have had, and would probably have exercised, this right of resumption. But though this may have been the motive of the Legislature in excluding 'demesne lands' from the operation of the Act of 1881, I can find nothing in any of the Land Acts to show that it is essential to constitute 'demesne' that the landlord should have the power to resume possession. *It is used to describe the character of the lands just as are used the words 'agricultural or pastoral.'* "

In this case there was not any landlord claiming or asserting any right to resume lands as his demesne, for the fee was vested in the tenant, and so far as the landlord was concerned it was immaterial whether the lands were used as demesne or as an ordinary agricultural farm provided his security for the fee-farm rent was not impaired; and the judgment of the Lord Chancellor appears to me to be founded on the fact that the holding in its physical character and user answered the description of demesne land at the time the Land Act of 1881 came into operation. As the Lord Chancellor observes, the word "demesne" in the Act is used to describe lands of a particular character, just as the words "Agricultural or pastoral."

This appears to me to be entirely in accord with the views of the Lord Chief Baron in *Magner* v. *Hawkes* (2). If a holding at the passing of the Land Act of 1881 was not agricultural or pastoral in its character, it was excluded from the fair rent provisions of the Act; whether its existing character resulted from the acts of the landlord, the acts of the tenant, or the acts of both. If an ordinary agricultural holding had been let to a tenant fifty years ago, and when the Act of 1881 came into operation it was covered with buildings or had otherwise lost its agricultural character, a judicial rent could not be fixed, even though the change in its physical character was the act of the tenant alone. It could not be treated as agricultural *quoad* the landlord, while non-agricultural in fact.

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(1) 32 L. R. Ir. 411.

(2) *Ibid.* 285.

In *Pratt* v. *Gormanstown* (1) I held that a holding of thirty-five acres, which had been incorporated by the tenant in his demesne, was to be considered as demesne land within the meaning of the Land Acts, although it had never been part of the demesne of the landlord or of any of his predecessors, and two of the members of the Court of Appeal (2) agreed with that opinion, while the two others held that the lands were neither agricultural nor pastoral in their character.

On a review of all these cases to which I have referred it appears to me that if this Court is satisfied that the holding before it, or a substantial portion of it, in its physical character, and in its user, fulfilled the conditions of demesne land at the passing of the Act of 1881, the holding should be excluded from the fair rent provisions of that Act, and consequently from the provisions of the Redemption of Rent Act.

In the present case a strange anomaly would arise if after coming to the conclusion that the lands, or a substantial part of them, were physically part of the demesne of Balyna, we should hold that they were not demesne lands within the meaning of the 57th section of the Land Act of 1881, by reason of their never having been the demesne of Eugene Quirke. The words "demesne lands," in section 58, sub-sect. 2 of the Act of 1881, must receive the same interpretation as the words "demesne land" in sub-sect. 1 of section 15 of the Act of 1870. Not only are the Acts in *pari materia*, but, by section 57 of the Act of 1881, they are to be construed together as one Act. But according to the settled canons of construction, where as in this case no apparent reason for any difference exists, the word "demesne land," in section 15

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(1) [1894] 2 Ir. R. 279.

(2) *Ibid.* 557.

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of the Act of 1870, must receive the same interpretation as the same words in section 28, sub-sect. 2 of that Act. The latter sub-section excepts "demesne lands" from the leasing powers given by the Act: the former sub-section excepts "demesne lands" from the compensation provisions of the Act.

It could not be seriously argued, I think, that if the holding has been so incorporated with Balyna, as to form one demesne, it is not outside the leasing powers given by the Act of 1870, and if so, why does it not fall within the exceptions contained in section 15 of the Act of 1870, and the 58th section of the Act of 1881?

The sub-commission in this case appears to me to have arrived at a right decision, and the order dismissing the tenant's originating notice must be affirmed, and the appeal dismissed with costs.

Solicitors for the tenant: *O'Hagan & Son.*
Solicitors for the landlord: *Rooke & Co.*

T. H. M.

AARON'S REEFS (Limited) *v.* TWISS [1].

(1891. No. 1447.)

Appeal.
1894.
June 10, 14, 15, 18.
July 20, 26.

Company—Prospectus—Misrepresentation—Shareholder—Repudiation by plea —Forfeiture of shares.

A joint-stock Company, formed to work a gold mine, with a capital of £200,000, in shares of 5*s.* each, issued a prospectus announcing a first issue of 200,000, payable 6*d.* on application and 6*d.* on allotment, and no further call that year. The prospectus then (among other things) stated:—"This Company has entered into a contract to acquire the Concession La Victoria, forming part of the well-known mining property of the Victory Gold Mining Company in Venezuela, and will have the special advantage of taking possession of a property which, already proved to be rich, requires only the erection of machinery (tenders for which are about to be invited) to be at once in a position to make returns. It is proposed, in the first instance, to erect a forty-

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[1] Before Walker, C., Porter, M.R., and Fitz Gibbon and Barry, L.JJ.

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stamp mill, and make additions from time to time as the increased output may render it necessary. An average yield of only 1½ ounces per ton would give a return of 3600 ounces per month, value nearly £14,000, the greater part of which should, owing to the working facilities, be available for distribution as dividends, and (it is not unreasonable to anticipate) the mine should readily and speedily pay dividends to the extent of 100 per cent. Every expert who has visited this property to view its wonderful formation testifies to its wealth, and the consensus of opinion of the many experts is that it must prove to be one of the richest mines in the world." It then stated that the only contracts entered into were one dated the 3rd February, 1890, between the Victory Gold Mining Co., Limited, of the one part, and the City Stock Exchange Co., Limited, of the other part, and one dated the 14th February, 1890, between the City Stock Exchange Co., Limited, of the one part, and Aaron's Reefs, Limited, of the other part.

It appeared that this was the fourth Company connected with the mine. In 1882 the Victoria Co. was started for the purpose of working the mine. It never paid any dividend, and was wound up in 1885. The Victory Co. was started in 1886. It never paid any dividend, and was wound up in 1887. The mine was sold to one B. for £2000 in cash, the purchaser assuming liabilities for £8000, who re-sold it for £3910 (and £131,000 in shares) to the Victory Gold Mining Co. The Victory Gold Mining Co. never worked the mine, but in 1890 sold a portion of the property on which the mine was situate to the City Stock Exchange Co. for £25,000, to be paid by the plaintiff Company. The City Stock Exchange Co. then sold the same portion of the property to the plaintiff Company for £131,000, which was to be paid by the plaintiff Company. Out of the £50,000 the entire of the first issue, £38,000, was to go to pay the Stock Exchange Co. and the Victory Gold Mining Co. Of the remaining £12,000, £8000 was to go between the same two Companies, leaving £4000 only available as working capital. It was proved that a forty-stamp mill would cost between £20,000 and £30,000.

In September, 1890, the defendant, having heard of the Company from a friend who read the prospectus and the reports to him, applied for 100 shares by letter, and enclosed a cheque for £2 10*s*. Not having received any answer the defendant wrote to the Company on the 19th January, 1891, complaining of the fact that he had received no acknowledgment, and demanding the return of his money. On the 22nd January, 1891, the secretary wrote that the letter of allotment had miscarried, but as the allotment had been made it could not be cancelled. On the 27th January, 1891, the defendant wrote, asking for a prospectus of the Company, and also if there were any more shares to be disposed of. On the 2nd February, 1891, he wrote, enclosing a cheque for £2 10*s*. on the allotment, and asking again if there were any more shares to be disposed of. On the 5th March, 1891, a call of 4*s*. per share was made, payable on the 19th March, and notice was given to the defendant. He then made inquiries in London about the mine, and, in consequence of what he heard, took no notice of the call. On the 27th April a letter was written to the defendant, requiring him to pay the amount of the call, £20 4*s.* 2*d.*, and that in the event of his failing to do so his shares would be forfeited. He took no notice of this, and on the 5th May his shares were forfeited, and he received notice of the forfeiture by letter of that date.

In an action by the Company for the amount of the unpaid call the defendant pleaded (amongst other defences) that he was induced to become the holder of the alleged shares by the fraud of the plaintiffs, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from the said shares, he repudiated or disclaimed the said shares and all liability in respect thereof, and stated the particulars of fraud relied on:—

Held, by the Lord Chancellor and by Porter, M.R., (1) that the statements in the prospectus did not amount to a fraudulent statement of fact, or to a concealment of material facts; and (2) that the repudiation of the shares by the defendant by his statement of defence was not sufficient repudiation of liability against the Company, and that judgment should be entered for the plaintiffs.

Held, by FitzGibbon and Barry, L.JJ., (1) that the statements in the prospectus, being incapable of being accomplished from the terms of the contracts, entered into by the Company and referred to in the prospectus, were fraudulent representations; and (2) that, having regard to the forfeiture of the shares, the defendant's repudiation by plea was sufficient; and that judgment should be entered for the defendant.

The judgment of the Exchequer Division (Andrews and Murphy, JJ.) for the defendant accordingly stood affirmed.

This action, which was tried before Holmes, J., and a common jury on 26th and 27th October, 1892, was brought to recover £20 4*s.* 2*d.*, money due from defendant in respect of 100 shares in the plaintiffs' capital formerly held by the defendant, but forfeited on the 27th April, 1891, £20 being amount of call of 4*s.* per share on said shares, payable the 19th March, 1891, and 4*s.* 2*d.*, being interest at 10 per cent. from date of call to date of forfeiture.

The defendant traversed the allotment of the shares to him, the due appointment of the directors, the qualification of Larchin and Pym, as directors of the plaintiff Company, to make the alleged call, pleaded that the alleged allotment and the alleged call were not made by any persons having authority to make same, that the alleged call was made for purposes other than those for which the Company could make calls, and was not made *bona fide* for the benefit of the Company, and was not authorized by the constitution of the Company; and (paragraph 8) further pleaded that the defendant was induced to become the holder of said shares by the fraud of

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the plaintiffs, and, within a reasonable time after he had notice of said fraud, and before he had received any benefit from or in respect of said shares, repudiated the said shares and all liability in respect thereof: the particulars of fraud being given as—1, the making of the call within a year; 2, the statement in the prospectus that Larchin and Pym were directors and that the other directors were to be elected by the shareholders; 3, the statement in the prospectus that assays of the different lodes had been made by competent authorities, and the reference to reports therein, whereas no reports had been obtained for the purpose of the Company and no authorities had been employed to make such reports, nor had the persons issuing the prospectus any reasonable grounds for believing that the persons making the reports (if any) were competent to make them; 4, the statement in the prospectus that the Concession La Victoria had been already proved to be rich and required only the erection of machinery (tenders for which were about to be invited) to be in a position to at once make returns, whereas the said Concession had never been proved to be rich nor had tenders ever been nor were they ever invited for the erection of machinery; 5, that the promoters of the plaintiff Company were connected with a Company called the Victory Gold Mining Company, Limited, which was a failing Company, the business of which had been unprofitable, and the plaintiff Company was got up by the said promoters for the purpose of recouping the losses of the Victory Gold Mining Company, and the losses that they had incurred or were liable to incur thereby, by selling to the public through the medium of the plaintiff Company what they were aware was an unprofitable business and mine, while representing the said mine to be of a highly profitable character. The defendant subsequently gave notice that he would apply at the trial to amend his defence by adding the following plea:—

"As a further defence the defendant says that Shirshaw Powell Gilbert, Thomas Gilbert, Robert Larchin, Arthur Malcomson, F. G. Pym, Francis Malcomson, J. Nicholls, Abraham Norman, W. Norman, J. Bridegroom, L. Greenwell, and others acting with them, being members of or connected with a notorious gang of Company Promoters known as the Gilbert Gang, in the city of London, combined, confederated, and conspired together to cheat and defraud the defendant and other persons members of the public, by inducing

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them to contribute monies to, and take shares in, bogus Companies got up and promoted by said Gilbert Gang for their own advantage and for their private ends; and for the purpose of so doing the said Gilbert Gang, or some of them, in the year 1882, got up and promoted a bogus Company called the Victoria Company for the pretended purpose of working an alleged Gold Mine called the Victoria Mine in Venezuela, which Company never worked the said mine or ever paid any dividends, and which said Victoria Company was in the year 1886, in pursuance of the said conspiracy, wound-up and reconstituted, and formed by the said Gilbert Gang into another bogus Company called the Victory Company, Limited, of which Company the said persons above mentioned, or some of them, or their nominees, were directors, secretaries, debenture holders, or with which they were otherwise connected, and which Company was also got up for the pretended purpose of working the said alleged mine, but which Company never worked the said mine or paid any dividend. In pursuance of the said conspiracy the said Victory Company, Limited, was in the year 1887 wound-up and sold in 1888 to the said Bridegroom, who was a nominee of or a member of the said Gilbert Gang, for a sum of £2000, and was then in further pursuance of the said conspiracy resold by him to the Victory Gold Mining Co., Ltd., for £3910 cash, and £131,000 in shares, which said Victory Gold Mining Co., Ltd., never worked the said mine, or paid any dividend, but was a bogus Company got up and promoted by the said Gilbert Gang, and carried on by the members thereof as directors, promoters, debenture-holders, secretaries, or otherwise, in their own interests; and the defendant says that, in further pursuance of the said conspiracy, the said Arthur Malcomson, Shirshaw P. Gilbert, W. Norman, R. Larchin, T. Gilbert, and the other persons constituting the said Gilbert Gang, with the object of concealing their connection with the plaintiff Company, and the profits coming to them by the promotion thereof, and for the purpose of defrauding and cheating the defendant and other persons, by inducing them to pay money for and to take shares in the plaintiff Company, got up and promoted a bogus Company called the City Stock Exchange Company, Limited, composed of members of the Gilbert Gang, and put it forward as the vendor to and promoter of the plaintiff Company; and the said Gilbert Gang, under the title of the said Victory Gold Mining Company, Limited, sold, or purported to sell, to themselves, under the style of the said City Stock Exchange Company, Limited, a portion of the said alleged mine for the nominal sum of £25,000, which sum was to be payable to the said Victory Gold Mining Company, Limited, by the plaintiff Company (Aaron's Reefs, Limited), which plaintiff Company the said Gilbert Gang had at the same time, in pursuance of the said conspiracy, and for the purpose of defrauding the defendant and others as aforesaid, got up and caused to be registered, for the pretended purpose of working the said portion of the said mine; and it was arranged in pursuance of the said conspiracy that the said sum of £25,000 should be paid to the said Victory Gold Mining Company, Limited, out of monies to be received from the defendant and other

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members of the public for the subscription of shares in the plaintiff Company; and that, in further pursuance of said conspiracy, the said Gilbert Gang, under the title and by means of the said City Stock Exchange Company sold or purported to sell to themselves, under the style of the plaintiff Company (Aaron's Reefs, Limited), the said portion of the said mine for the sum of £131,000, to be paid for out of the said subscriptions for shares in the plaintiff Company of the defendant and other members of the public; and that the members of the Gilbert Gang, as promoters, directors, debenture holders, secretaries, or otherwise, of the plaintiff Company and City Stock Exchange Company and Victory Gold Mining Company, Limited, have absorbed and must absorb all the moneys contributed by the public for shares; and that the plaintiff Company has not ever been carried on for the purpose of working any part of the alleged mine; and that, in further pursuance of the said conspiracy, the said Stock Exchange Company, Limited, was wound-up shortly after the alleged sale to the plaintiff Company; and the said S. P. Gilbert was appointed liquidator thereof; and the defendant says that all the said Companies, including the plaintiff Company, were and are bogus Companies, and that they were all fraudulently promoted and worked by the said Gilbert Gang for their personal advantage; and that the prospectus of the plaintiff Company was issued in pursuance of the said conspiracy; and that, being ignorant of the facts hereinbefore mentioned, the defendant was deceived by the representations of the said Gilbert Gang contained in the said prospectus of the said plaintiff Company, and mentioned in the statement of defence, and believed that it was a *bona fide* Company, and, relying on the representations therein contained, he applied for the shares mentioned in the writ of summons, and further that the alleged call upon the said shares was made in pursuance of the said conspiracy, and for the advantage of the said Gilbert Gang, and not for any *bona fide* purposes connected with the plaintiff Company.

The certificate of incorporation of the plaintiff Company, dated the 16th January, 1890, copy of prospectus, and attested copy of the memorandum and Articles of Association were put in evidence.

The Prospectus of Aaron's Reefs, Limited, registered, &c., stated:—"Capital, £200,000, in shares of 5*s*. each. No further liability. First issue of 200,000 shares, payable 6*d*. on application, and 6*d*. on allotment. No further call this year. *Directors:*—R. Larchin, Director, Victory Gold Mining Company, Limited; Major-General F. J. Pym, C.B.; the other members of the Board to be elected by the shareholders. *Solicitors:*—Chave and Chave, Devonshire Chambers. . . . . *Secretary, pro tem.:*—Arthur Malcomson. *Offices:*—Broadstreet Avenue, London, E. C.

"This Company has entered into a contract to acquire the Concession La Victoria, forming part of the well-known mining property of the Victory Gold Mining Company in Venezuela, and will have the special advantage of taking possession of a property which, already proved to be rich, requires only the erection of machinery (tenders for which are about to be invited) to be at once in a position to make returns. The assays have all been made by competent authorities from fair average samples of the different lodes, and not picked specimens. (*Vide* Reports.) It is proposed in the first instance to erect a forty-stamp mill, and to make additions from time to time as the increased output may render it necessary. An average yield of only one and a-half ounces per ton would give a return of 3600 ounces per month, value nearly £14,000, the greater part of which should, owing to the working facilities, be available for distribution as dividends, and it is not unreasonable to anticipate the mine should readily and speedily pay dividends to the extent of 100 per cent." It then referred to the property's well-defined lodes and enormous outcrops containing payable gold, and continued :—" The extracts from reports by gentlemen of repute are worthy of great consideration; the directors feel that absolute reliance can be placed upon them. Every expert who has visited this property to view its wonderful formation testifies to its wealth, and the consensus of opinion of the many experts is that it must prove one of the richest mines in the world."

Then followed several extracts from reports and letters of a most favourable character, and the Prospectus concluded :—" The only contracts entered into are one dated 3rd February, 1890, between the Victory Gold Mining Company, Limited, and the City Stock Exchange Company, Limited, and one dated 14th February, 1890, between the City Stock Exchange Company, Limited, and Aaron's Reefs, Limited."

The Articles of Association provided, *inter alia*, that the Directors might from time to time make calls, and in case of non-compliance by any holder of shares, might by resolution declare his shares forfeited, his liability for previous calls and interest thereon at 10 per cent. to continue, notwithstanding such forfeiture. The directors who were to be not less than two or more than four in number, were to be paid £400 per annum, this remuneration to be divided amongst them as they should agree; no director was to be disqualified from contracting with the Company, and no contract entered into by the Company with any Company in which any director was a director, or in any way interested, to be voided ; nor was any director to be held liable to account for any profit realized by any such contract; but no director should vote in respect of any such contract. At the ordinary meeting of the Company in the year 1893 and in every subsequent year two of the directors for the time being should retire from office.

T. Malcomson, first witness, secretary of the plaintiffs from the 16th June, 1891, to the 25th March, 1892, produced the register of shareholders, also the minute-book of the directors.

Witness was not present at the meeting of the 5th March, 1891, nor was he then secretary.

R. Larchin, second witness, had been a director of the plaintiff Company; proved the document of the 14th February, 1890, by which the signatories to the Memorandum of Association appointed Pym and witness directors. Pym and witness acted as directors, and were so acting in March, 1891. On the 5th March, 1891, there was a meeting of the Board. The minutes of that meeting were in the handwriting of witness, and were signed by Pym at the next meeting, he being the chairman on that occasion. Witness was then acting as secretary. The minutes of the meeting of the 5th March, 1891, were put in evidence. At this meeting the directors, by resolution, made a call of 4*s.* per share. Notice of the call was sent to the defendant; the call had not been paid by defendant.

Cross-examined:—"I ceased to be a director in March, 1892; C. Watson, F. Braddell, and Pym, are now the directors. The Company was founded for the purchase of the Victoria Concession. The first Company was the Victoria Gold Company, Limited. I was a director of it. It was floated about 1882. The first secretary was Saunderson, and S. P. Gilbert was afterwards the secretary. The offices were Devonshire Chambers, Bishop's Gate. I do not think that those were Gilbert's offices. That Company was formed to purchase the Victoria Concession in Venezuela. It was agreed that £100,000 should be given for it. The vendor was Lowndes. That Company lasted until the 29th November, 1885. It paid no dividend. The solicitor of the Company was called Chave. S. P. Gilbert is still alive. I have not seen him lately. Probably he was the liquidator. T. Gilbert is now in prison. Prospecting for mining operations was carried on between 1882 and 1885. A new Company was formed in January, 1886, called 'The Victoria, Limited'; it took over the assets and liabilities of the previous Company. I was a director, S. P. Gilbert was also a director, and may have been secretary. It had its offices in Devonshire Chambers: these were Gilbert's offices, and the Company paid him rent for them. It paid no dividend. It lasted till the end of 1887. It was then wound-up by order of the Court upon the petition of a creditor. The public subscribed

5*s.* a share on 170,000 shares. The money was spent in the mine. The liquidators of that Company were, I think, a firm of accountants. The property of the Company was sold by order of the Court in 1888. It was bought by Bridegroom. I heard that it was bought by him on behalf of a syndicate, of which Gilbert was one. He gave about £10,000 for it—that is, he paid £2000 in cash, assuming liabilities to the amount of £8000. A month afterwards another Company was formed called the 'Victory Gold Mining Company,' which bought the property from Bridegroom for £3910, and £131,000 in paid-up shares, taking over the £8000 liabilities. I was a director of this Company also, and so was Gilbert; A. Malcomson was secretary. Thomas Gilbert may have been one of the signatories to the Memorandum of Association. I can't tell how much capital was subscribed for; the Company tried to raise money by debentures. The public would not subscribe for them, and £40,000 debentures were issued to Burt at 75 per cent. discount. He paid £10,000 for them. They bore 5 per cent. interest. That Company paid no dividend. On the 3rd February, 1890, I signed the Memorandum of Association of the City Stock Exchange Company. Gilbert was a director. I am not certain whether Malcomson was. That Company entered into two agreements—one, the 3rd February, 1890, with the Victoria Gold Mining Company; and the other, the 14th Feb., 1890, with the plaintiffs."

By the Agreement of the 3rd February, 1890, made between the Victory Gold Mining Company, Limited (vendors), and the City Stock Exchange Company (purchasers), the latter Company purchased portion of the Mining Concession of La Victoria adjoining the Concession of Altamira, Venezuela, in consideration of £25,000, £6000 to be paid as deposit forthwith, and the balance thus "The purchaser has, according to verbal agreement, already caused to be registered a Joint Stock Company called 'Aaron's Reefs, Limited,' under the Companies Acts, 1860 to 1890, for the purpose, *inter alia*, of acquiring and working the said portion of said Mining Concession, such Company having a nominal capital not exceeding £200,000; and the balance of the said £25,000 shall be payable by such Company to the vendor direct, and not by the purchaser, who shall be relieved from all liability in respect thereof, provided that such Aaron's Reefs, Limited, undertake to set apart for and pay to the vendors one moiety of the monies received from the public for the subscription of shares thereon towards payment of such balance until the same is fully satisfied." It was further provided that the purchaser should accept the title without investigation, and admit the accuracy of the description of the property; and that on completion by payment of the balance of the purchase-money, possession of the property sold should be given to the purchasers or their nominees, on registration of the said Company, to enable them to proceed to the working and development thereof.

The Seal of the Victory Gold Mining Company, Limited, was thereto affixed in the presence of R. Larchin, and Arthur Malcomson, Secretary, Directors; and that of the City Stock Exchange Company, Limited, in presence of A. Malcomson and S. P. Gilbert, Directors, and W. J. Dormar, Secretary. The indorsed receipt on behalf of the Victory, &c., Company, for said deposit of £6000 was signed by R. Larchin and A. Whitten, Directors, and A. Malcomson, Secretary.

By the Agreement of the 14th February, 1890, made between the City Stock Exchange Company, Limited (vendor), and Aaron's Reefs, Limited (purchaser), the latter Company purchased all the vendor's interest under the Agreement of the 3rd February, 1890 (under which a balance of £19,000 still remained due) in the said portion of said Mining Concession, the purchaser undertaking to set apart for and pay to the Victory Gold Mining Company, Limited, direct, one moiety of the moneys received from the public for the subscription of shares in Aaron's Reefs, Limited, towards payment of the balance of £19,000 until such balance should be fully satisfied, the consideration to be £131,000 payable in cash, as follows:—"The Company shall, until the said £19,000 payable to the Victory Gold Mining Company, Limited, shall be fully satisfied, set apart and pay to the vendor the other moiety of the moneys received from the public for the subscription of shares therein, and thereafter the Company shall set apart for and pay to the vendor two-thirds of the monies received from the public for the subscription of shares therein towards payment of the £112,000, balance payable to the vendor, until the same is fully satisfied; the remaining one-third of such subscriptions to be applied for working capital." The vendor was to be at liberty, in case of non-compliance on the purchaser's part with these terms, to determine the agreement by notice in writing, in which case all monies paid thereunder were to be forfeited.

The Seal of the City Stock Exchange Company, Limited, was affixed to this document in presence of A. Malcomson, Director and Secretary, and that of Aaron's Reefs, Limited, in presence of R. Larchin and F. G. Pym, Directors, and A. Malcomson, Secretary.

By an Agreement of the 17th June, 1891, made between the City Stock Exchange Company, Limited (in liquidation), S. P. Gilbert (Liquidator of said Company), and Aaron's Reefs Company, and supplemental to the Agreement of the 14th February, 1890, the principal agreement was modified by providing

that Aaron's Reefs Company, Limited, should pay to the Victory Gold Mining Company, Limited, the balance (viz. £12,500) of the sum of £19,000, payable under the principal agreement (£6500 having been paid off) in the following way: £1100 in bills at one month forthwith, and the residue in debentures—and by providing that Aaron's Reefs Company, Limited, should pay to Gilbert, as Liquidator of the City Stock Exchange Company, Limited, the balance (viz. £124,500) of the sum of £131,000, payable under the principal agreement (£6423 having been paid off) in the following way:—£2200 in bills at one month, £118,777 in fully paid-up shares of 5*s.* each, and the balance in debentures.

The Seal of Aaron's Reefs Company, Limited, was affixed to this document in the presence of Pym and Larchin, Directors, and F. Malcomson, Secretary.

Witness continued:—There were 8000 shares in the City Stock Exchange Company issued to Gilbert; no other shares were issued except to the signatories of the Memorandum of Association. The City Stock Exchange Company went into liquidation, having done no other business; Gilbert was the liquidator. The offices were in Broad Street Avenue, where the plaintiffs' offices are. The preliminary expenses of the plaintiff Company were about £150. Witness helped to prepare the prospectus of the plaintiffs. Pym was not a director of any of the other Companies. There could be no money available for working purposes out of the first issue of 200,000 shares. There were other issues. The Concession was proved to be rich by various inspections made by mining experts, by samples taken from the lodes, and by assay of such samples. The directors did not advertise for tenders for machinery. They got a tender for a stamp mill for £3000. The mill was not got. Witness did not know whether the tender was in writing. The reports attached to the prospectus were got for the previous Companies. Admiral Powell went out to report for the Victory Gold Mining Company. The reports and letters so attached to the prospectus were made or written in the years 1884, 1885, and 1886. There had been no manager of the plaintiffs appointed up to the present.

The following letters were then read. They were objected to by the Solicitor-General, but were afterwards used without objection on the cross-examination of Nicholls:—

14th September, 1890.

Nicholls to Gilbert,—Stating that the work was progressing, that Nicholls had cut a lode two feet thick; that all the samples tested showed a quantity of fine gold, though he failed to find any loose gold visible to the eye, and that all were in great glee.

14th September, 1890 (marked "Private").

Nicholls to Gilbert.—"Our's" (our shares) "will go up; I will make them jump bye-and-bye with some good startling cablegram. Be patient."

[London] 26th September, 1890.

Gilbert to Nicholls.—"Dear Sir,—You must keep two men working on the drive. Don't forget at any cost. It is most important to have something coming forward as to work being done; and I think you will cut the lode first here.—I am, yours very truly, S. P. GILBERT." (The copy of this letter in the press copy letter-book of the plaintiff Company was put in evidence.)

Witness was interested, at the date of the call, in the Victoria Gold Mining Company. There were 85,000 or 86,000 shares subscribed for at the date of the call. One shilling had been paid on each of these shares. The Company, at the date of the call, had £3500 standing to its credit. 570,000 shares have been disposed of altogether. There were four miners at the mine. The resolution for the call was passed on the 5th March, 1891. A report of the 5th February, 1891, was sent out. At this time samples had been taken and assayed. The meeting referred to in the report was not held until the following year. Witness acquiesced in the call. There were only Pym and witness present. Witness was acting as secretary. The list of shareholders in the Company was registered in the beginning of this year (1892) immediately after the general meeting. Witness was now being paid £100 a-year as secretary to the Company. The plaintiffs pay £100 a-year rent for their offices to Gilbert. The Victoria Gold Mining Company pay £350 a-year for their offices. That Company is now being reconstructed. It went into liquidation a month ago. It is now the Altamira.

(Re-examined.) Witness stated that he sent out the prospectus, but would not like to say that the extracts from reports were all from reports then in existence (they had all been in existence), that he had visited the property himself, concurred in the reports,

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and had acted *bona fide*, and in the interest of the Company in making the call. The only prospectus issued was that produced; many thousand copies of it were circulated. Witness composed it with the assistance of Mr. Gilbert; 400,000 paid-up shares were issued to the City Stock Exchange Company; 540,000 shares were issued to the public since the call. When the Company went to allotment there were between 50,000 and 60,000 shares allotted; at the date of the call 3046 paid-up shares were held by shareholders. (Re-cross-examined.) Arthur Malcomson was the secretary of the Victoria Gold Mining Company, and possibly the holder of one share therein. He was a signatory of the City Stock Exchange Company, and held one share in it, and acted as director thereof with Gilbert; previously he was a clerk of S. P. Gilbert, and was so in the Victoria, Limited. Thomas Gilbert was a signatory for one share in the City Stock Exchange Company; he had been a shareholder in the Victoria Gold Mining Company, but he sold his shares; he was the original promoter of the Victoria Gold Company, Limited. Of the signatories (with one share) to the Articles of Association of the plaintiff Company, Abraham Norman was a signatory for one share in the Victoria Gold Mining Company. Charles Fiber held 50 shares in the same Company. William Scott held 33 shares in it, and was a signatory for one share in the City Stock Exchange Company. Biggs is a stock and share dealer. Hanson is a solicitor's clerk, clerk to Mr. Chave, the solicitor for the plaintiffs, and also for the Victoria Gold Mining Company, and for the City Stock Exchange Company.

John Nicholls, third witness, a mining captain, had been thirty-eight years in mines, was manager of the Victoria Gold Mining Company from November, 1888, to January, 1891; lived near the Concession; had not known it before. The Concession consisted of Altamira and Victoria. Witness had been over the Victoria Concession, it was very valuable property, there was gold to be found in it; witness had prospected a portion of it to the best of his skill and judgment. There was no machinery erected on it. Witness knew of three lodes of ore, well defined, that is, not broken up. It was capable of being developed by the outlay of capital. Witness had driven adits and met with lodes; had tested it, and got from 15 dwt. up to an ounce per ton; had sent samples of the quartz to England. (Cross-examined.) Witness came home on the 28th January last. Lewis was now in charge, *pro tem.* He was secretary then to the Victoria Gold Mining Company. Witness kept three or four men at work; he used to write to Gilbert; wrote the letters of the 14th September, 1890, and received the letter of the 26th September, 1890; before that witness wanted to withdraw the men. A ten-stamp mill would be sufficient; a forty-stamp mill would cost between £20,000 and £30,000.

F. Pym, fourth witness, a retired Major-General, and a director of the plaintiff Company, was chairman up to last February, 1892; was at the meeting when the call was made. The call was made *bona fide* and in the interest of the Company. Witness had nothing to do with the other Companies. The directors had several letters from shareholders asking them to have the shares paid up. Witness knew nothing of the value of the property of the Victoria Gold Mining Company; got no independent report except from Larchin; did not know that Larchin was interested in the call. Never made calculations; had been director of ten Companies; they were not successful. S. P. Gilbert asked witness to become director; witness took 100 shares to qualify. £400 was to be given amongst the directors; witness got his part in paid-up shares.

Edward Twiss, the defendant, was examined as a witness on his own behalf, and stated that he heard in September, 1890, of the Company from T. Gabbett, who read to him the prospectus and the reports annexed thereto; he then applied for shares in consequence of what was so read to him, *i.e.* the prospectus. Witness sent the letter of application for shares in September, 1890.

A considerable correspondence between the defendant Twiss and the plaintiffs was put in evidence. On the 24th October, 1890, defendant applied for 100 shares upon a printed form of application, and enclosed cheque for £2 10*s.* Receiving no reply he wrote on the 15th January, 1891, asking for a return of the money in case no shares had been allotted to him. F. Malcomson replied on the 17th January, 1891, stating that the letters of allotment must have failed to reach the defendant, and enclosing a duplicate, and asking for £2 10*s*., due on allotment. On the 19th January, defendant wrote back that he did not now require any shares, and asked for a return of the £2 10*s*. already sent. F. Malcomson replied that as the shares had been allotted in accordance with defendant's application they could not be now cancelled. On the 27th January defendant acknowledged receipt of this letter, asked for a copy of the prospectus, as his copy had been mislaid, and asked whether any more shares were procurable, as if the mine was a *bona fide* transaction he should be disposed to take more. On the 30th January, Larchin sent defendant a prospectus, asking that it should be returned. Defendant, on the 2nd February, returned the prospectus with cheque for £2 10*s*., due on allotment of his 100 shares, again asking whether any shares remained to be disposed of. On the 3rd February Larchin sent a form of application (signed per F. Malcomson), saying that if defendant wished for more shares, and filled up the form, he (Larchin) would lay it before the directors, and try to obtain a further allotment for defendant. On the 5th March, the circular letter signed by Pym making a call of 4*s*. per share was sent to defendant, with copy of resolution of the directors of that date. Defendant then having asked for a list of the directors, Malcomson replied on the 16th March, that at present there were only two directors, Larchin and Pym, that the vacancies were to be filled up at the general meeting to be held shortly, and that amongst those nominated were Lord Osborne, Lieut.-Col. Gipps, and Dr. Jagielski. On the 21st March and 27th April, Malcomson again applied for the amount of the call, and receiving no answer, wrote on the 5th May, that defendant's shares were by resolution of the directors declared to be forfeited.

Several applications for the amount of the call and interest by Malcomson and by plaintiffs' solicitors were subsequently made to which defendant did not reply.

Witness read the prospectus enclosed in the letter of the 30th January, and the reports attached thereto, and in consequence wrote his letter of the 2nd February. Witness received the report of the 5th February, 1891, and the notice of the call on the 5th March, he then made inquiries in London about the mine. This he had not done before. In consequence of the result of these inquiries he took no notice of the call. This was the first transaction witness had had in shares of any kind. T. Gabbett read the prospectus through from beginning to end; he said that it looked a good thing to take shares in.

In reply to counsel for the plaintiffs the learned Judge stated that he was of opinion that the plaintiffs were entitled to a direction upon most of the defences pleaded. As to the defence of fraud he stated that it seemed to him that, if there was any evidence of fraud, it was rather of fraud by concealment than by actual representation. He thought that having regard to the reference to the contract for acquiring the Victoria Concession in the beginning of the prospectus, a question might arise as to whether there ought not to have been a disclosure of all the material circumstances connected therewith, and that it might be argued that, although the reference to the contracts at the end of the prospectus was sufficient, under and for the purpose of 30 & 31 Vict. c. 131, s. 38, it would not be a good answer to the defence of fraudulent concealment. Bushe, Q.C., asking that he might have an opportunity of raising these questions, the learned Judge put the following questions to the jury:—

1. Were the circumstances of the contract to acquire the Concession La Victoria, that is to say, the fact and terms of the sale by the Victory Gold Mining Company to the City Stock Exchange Company, and of the re-sale of the last-named Company to the plaintiff Company, material matters to be disclosed in the prospectus of the plaintiff Company? Answer—"Yes."

2. Were the said circumstances not disclosed in the prospectus with the fraudulent intent of concealing from persons reading it, matter which if known would have prevented them from becoming shareholders, and of inducing them by such concealment to apply for shares to the plaintiff Company? Answer—"Yes."

3. Was the reference at the end of the prospectus to the contracts of February, 1890, a reasonable means of bringing to the notice of persons reading the prospectus the circumstances mentioned in the above question? Answer—"No."

4. Was such reference introduced by the directors with the knowledge that it was not a reasonable way to convey, and in the

belief that in point of fact it would not convey the information not disclosed in the body of the prospectus? Answer—"Yes."

5. Was the defendant induced to apply for the allotment of shares by the prospectus? Answer—"Yes."

6. Did the defendant know anything of the circumstances mentioned in questions 1 and 2 when the shares were allotted to him and the call made? Answer—"No."

Bushe, Q.C., desiring that some further questions should be put to the jury, handed in same in writing. They were as follows:—

7. Was the statement that the mine had been proved rich in the prospectus true or false? Answer—"False."

8. If false, was it false to the knowledge of the directors issuing the prospectus or did they neglect to inform themselves before issuing the prospectus that the same was false? Answer—"Yes."

9. Was the Company formed with the *bona fide* intention of working the mine? Answer—"No." Or was it fraudulently promoted by persons connected with the Victory Gold Mining Company, for the purpose of recouping the losses of that Company, and for the purpose of the private gains of the promoters of the plaintiff Company? Answer—"Yes."

10. Did the defendant by not paying calls intend to repudiate the shares, and was such a repudiation within a reasonable time after discovering the misrepresentation of the prospectus? Answer—"Yes."

11. If not, had the defendant reasonable time to repudiate his shares after discovery of the misrepresentation and before action? No answer.

The learned Judge in his report further stated that, although to prevent the possible necessity of a second trial in a small action of this kind, he took the opinion of the jury on the questions so suggested by Bushe, Q.C., his own view was against them. He thought that the words in the prospectus, "the mine had been proved to be rich," must be interpreted by the context as meaning, proved rich by the usual methods by which mining ground is prospected previous to mining operations, and not by actual working; and so told the jury. He considered that in this sense there

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was no evidence to meet the testimony of Larchin and Nicholls, who had visited the Concession, and the reports, except that the mine had not been actually worked—a fact that was absolutely immaterial. The richest gold reef in the world would have yielded to Mr. Gilbert's friends (who seemed to have been allowed by the shareholders of the several Companies to do as they liked) small profits compared with what they could have derived by the manipulation of the successive Companies, and therefore that there was no evidence to go to the jury on questions 7 and 8. He added that question 9 presented a proposition which was to him entirely novel, no authority being referred to in support of it, and no principle on which the intentions or objects of the promoters of a Company could affect the rights of a Company when formed, and that there were obvious objections to the two remaining questions.

After the jury retired the learned Judge stated the above views to the parties, and said that he would direct a verdict irrespective of the answers to 7, 8, 9, 10, and 11, adding that he was disposed to think that repudiation was not needed, having regard to the forfeiture of the shares so soon after the inquiries by the defendant. Upon this ground, and upon the answers to the first six questions, a verdict was directed for the defendant. The learned Judge further stated in his report that, if the Court should think that there was any evidence to go to the jury on any of the other questions, he was perfectly satisfied with the findings, adding that Bushe, Q.C., had asked him to leave to the jury the question whether the call was or was not made *bona fide* for the benefit of the Company, but that this was not included in the questions put in writing by counsel, and that he had been willing to allow any amendment of the pleadings necessary to support the questions put, but, to prevent expense and trouble, had not required such amendments to be actually made, that this seemed to be acquiesced in, and that the case should be dealt with as if they had been made.

The plaintiffs applied to the Exchequer Division to set aside the verdict and judgment and to enter the verdict and judgment for the plaintiffs, or for a new trial. The Divisional Court

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(Andrews and Murphy, JJ.), on the 29th June, 1893, refused the motion (1). The plaintiffs appealed.

The Solicitor-General (*Hemphill, Q.C.*), *White, Q.C.*, and *John Murray*, for the plaintiffs:—

Where there is an action for calls, and the defence is fraud, the Court must consider whether, on the whole, there is a misstate-

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(1) The following are the judgments of Andrews and Murphy, JJ.:

ANDREWS, J.:—

This was an action by a Company called Aaron's Reefs, Limited, against the defendant Twiss, to recover calls upon shares in the Company which had been allotted to him upon his own application.

It is unnecessary to refer to the defences by which the defendant put the plaintiffs on proof of the various formal matters necessary to sustain such an action, and which were proved on their behalf.

The real defence was fraud on the part of the plaintiffs, whereby the defendant was induced to take the shares, and the questions we have to determine in this case all arise upon the defence of fraud.

They must be decided upon the facts and circumstances of this case, and not with reference to other cases between the plaintiffs and certain others of their shareholders, in one of which (Kiernan's case) we know that the evidence was, and in others of which it may have been, different.

Prior to the defendant's application for the shares of which he was registered as the holder in October, 1890, a prospectus was issued by the plaintiffs, stating that the capital of the Company was £200,000, in shares of five shillings each, and announcing a first issue of 200,000 shares. This prospectus was, as such documents frequently are, of a highly-coloured character, and was so framed for the obvious purpose of inducing persons to become shareholders. Extracts were appended to it from equally highly-coloured reports, which it stated had been made by gentlemen of repute, and were worthy of great consideration, and upon which the prospectus stated that the directors felt that absolute reliance could be placed. The business of the Company was represented as gold mining in a Concession called La Victoria, in Venezuela, which the Company had entered into a contract to obtain, and which required only the erection of machinery to be at once in a position to make returns. After referring to the results of the various assays from fair average samples, the prospectus stated that it was not unreasonable to anticipate that the mine should readily and speedily pay dividends to the extent of 100 per cent., and that the consensus of opinion of the experts who had visited it was that it must prove to be one of the richest mines in the world. I need not go through the statements in the extracts from the reports appended to the prospectus. One of these was that

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ment of material facts: *Bentley & Co.* v. *Black* (1). A statement of opinion may be a statement of fact: *Angus* v. *Clifford* (2). Under the 38th section of the Act of 1867, if a contract affecting the Company is mentioned, that is enough, and we have mentioned every contract: *Sullivan* v. *Metcalfe* (3); *Twycross* v. *Grant* (4); *Gover's Case* (5). The repudiation here was far too late; if a man holds on to a contract as long as it may be beneficial, knowing it

"at Victoria you have undoubtedly one of the very richest gold mines in the world," and all of them were of a glowing character.

At the end of the above extracts two contracts were referred to by date, and parties' names, as the only contracts which had been entered into. These were a contract dated the 3rd February, 1890, between the Victory Gold Mining Company, Limited (part of whose property in Venezuela was stated in the prospectus to be the Concession called La Victoria), and the City Stock Exchange Company, Limited; and a contract dated the 14th February, 1890, between the City Stock Exchange Company and Aaron's Reefs, Limited. No further information as to the contents of these contracts was given in the prospectus.

Mr. Justice Holmes, before whom the case was tried, stated at the trial that he would allow any amendments of the pleadings necessary to support the questions he put to the jury, and we must now deal with the case as if all amendments necessary for that purpose were made.

The contract of the 3rd February, 1890, discloses that the Stock Exchange Company were to purchase that portion of the Concession of La Victoria, coloured pink on the plan thereto annexed, from the Victory Company for £25,000, to be paid as to £6000 by way of deposit, and as to the balance (£19,000) by Aaron's Reefs, Limited, which Company the Stock Exchange Company had caused to be registered for the purpose (*inter alia*) of acquiring the Concession in question; and the payment of this balance by Aaron's Reefs was to relieve the Stock Exchange Company from liability in respect thereof, provided that Aaron's Reefs undertook to set apart for and pay the Victory Company one moiety of the moneys received from the public for the subscription of shares until the balance of £19,000 was paid.

The contract of the 14th February, 1890, discloses that Aaron's Reefs thereby entered into that undertaking, and also purchased the Concession comprised in the contract of the 3rd February from the Stock Exchange Company for £131,000, payable in cash as follows, viz. until the £19,000 balance payable to the Victory Company was paid Aaron's Reefs were to set apart and pay to the Stock Exchange Company the other moiety of the moneys received from the to be founded on a statement which he knows to be false, he cannot repudiate it when it turns out against him: *Redgrave* v. *Hurd* (1); *Skelton's Case* (2); *Scholey* v. *Central Railway Company of Venezuela* (3). A delay of a fortnight may be fatal in the case of a going concern: *In re Scottish Petroleum Co.* (4). In order to defeat our claim the defendant must prove either:—1, an affirmative misrepresentation of facts; or 2, concealment of material infor-

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(1) 9 *Times'* Rep. 580.

(2) [1891] 2 Ch. 449.

(3) 5 C. P. D. 455, 461.

(4) 2 C. P. D. 469, 485.

(5) 1 Ch. D. 182, 200.

public for their subscription of shares, which would amount also to £19,000 and were thereafter to set apart and pay to the Stock Exchange Company two-thirds of the moneys received from the public for the subscription of shares towards payment of the balance of £112,000, until the same should be fully satisfied, the remaining one-third of such subscription to be applied for working capital; and it was provided that if Aaron's Reefs should fail to carry out those terms the Stock Exchange Company should be at liberty to determine that agreement, and all the moneys paid thereunder should be forfeited to them.

That the contents of these contracts of 3rd and 14th February, 1890, were material for the consideration of any person intending to take shares in Aaron's Reefs, Limited, does not appear to me to be open to any doubt whatever. £150,000 of the capital of £200,000 was to be absorbed in the acquisition of the Concession, for working which no machinery had been procured, and all the working expenses of which had to be provided for. It was represented by the prospectus as a property already proved to be rich, which only required the erection of machinery (tenders for which were, as was stated, about to be invited), to be at once in a position to make returns, which it was not unreasonable to anticipate would readily and speedily pay dividends to the extent of 100 per cent. The contracts in question show that three-fourths of the capital would be spent in acquiring the Concession, and that if the remaining one-fourth should ever be raised and become available for working expenses, of which there was no certainty whatever, the time at which it would come in was quite indefinite, and might be a very distant one, if it ever arrived at all. The possibility of working the Concession with any degree of efficiency by means of the remaining one-fourth of the capital was also upon the facts disclosed by the contracts an obvious and important question for the consideration of an intending shareholder. Contrasted with the inflated and glowing prospects held out by the prospectus, how startling might not the facts disclosed by the contracts have appeared to intending shareholders; and I think it unquestionable that persons intending to become shareholders might have been, and that it was reasonably probable that they would have been deterred by a knowledge

(1) 20 Ch. D. 1.
(2) 9 *Times*' Rep. 213.
(3) L. R. 9 Eq. 266 n.
(4) 23 Ch. D. 413.

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mation. If the defendant relies on fraud he must point out the particular acts of fraud on which he relies: *Angus* v. *Clifford* (1); *Peek* v. *Derry* (2). In *Gover's Case* (3) it was held by a majority of the Court of Appeal, affirming the decision of Bacon, V.-C., that even where the omission to disclose an agreement renders the prospectus fraudulent under the Companies Act, 1867, the shareholders remedy is against the person making the omission, and

of those facts from taking shares. That the only reference to those contracts made by the prospectus was not, and that the directors knew that it was not, a reasonable means of bringing, and would not bring, their contents to the knowledge of persons reading the prospectus seems equally plain, and it has not been denied that the defendant was induced by the prospectus to apply for the shares which were allotted to him and that he did not know the contents of the contracts of 3rd and 14th Feb. when the shares were allotted to him. It does not appear when he first became aware of the contents of those contracts. It is consistent with the evidence that he did not become so until the commencement of this action, or even afterwards; for although after the call he made inquiries about the mine in March, 1891, in consequence of the result of which he says he took no notice of the call now sued for, it does not appear what information he actually received as the result of those inquiries, though I think it may be assumed to have been of an unfavourable character.

The prospectus was a document issued by the Company, and for which, as a Company, they became responsible, and it was of course, issued for the purpose of attracting and obtaining shareholders. Now it was laid down by Vice-Chancellor Kindersley in *The New Brunswick and Canada Railway Company* v. *Muggeridge* (1 Dr. & Sm. 381), that those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact, within their knowledge, the existence of which might in any degree affect the nature or extent of, or qualify, the privileges and advantages which the prospectus holds out as inducements to take shares.

This passage from the Vice-Chancellor's judgment was cited with approval by Lord Chelmsford (then Lord Chancellor) in *The Central Railway Company of Venezuela* v. *Kisch* (L. R. 2 H. L. 113), in which he said that although in its introduction to the public some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, yet no misstatement, nor conceal-

(1) [1891] 2 Ch. 449. (2) 14 App. Cas. 337. (3) 1 Ch. D. 182.

that he is not entitled to have his name removed from the register. The same principle was laid down in *Heymann* v. *European Central Railway Co.* (1) by Lord Romilly, M.R.

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Ronan, *Q.C.*, *Bushe*, *Q.C.*, and *Samuels*, for the defendant:—

We have two separate grounds of defence—(*a*) The prospectus is fraudulent, and (*b*) that as the Company was the result of an

ment of any material facts or circumstances, ought to be permitted, and that, in his opinion, the public who are invited by a prospectus to join in any new adventure ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. The justice of these judicial statements is apparent. They are unquestionably sound law, and, in the interests of commercial honesty, on which commercial prosperity so largely depends, they ought to be acted on without hesitation in every case to which they are properly applicable. It has, however, been argued in the present case that the reference in the prospectus to the contracts of the 3rd and 14th February, 1890, being a sufficient compliance with the 38th sect. of the Companies Act, 1867 (30 & 31 Vict. c. 131), ought therefore to be regarded as sufficient for all purposes; and also that the notice of these contracts given by the prospectus should be held to be notice of their contents, and to deprive the defendant of any right to complain of the want of the information which their contents disclose.

As regards the first of these arguments, the 38th sect. of the Act of 1867 created a statutory fraud on the part of the promoters, directors, and officers of a Company, who knowingly issue a prospectus not complying with the requirements of that section, as regards a person taking shares on the faith of it, unless he shall have notice of the contract which ought to have been specified; but compliance with that section plainly does not exclude the consideration nor affect the consequence of any other fraud which may exist, independently of it, either on the part of the officers of a Company, or of the Company itself. Although the section may be complied with, and the statutory fraud which it creates may not arise, it is obvious that there may still be fraudulent misrepresentation, and also, in my opinion, fraudulent concealment with reference to the very contracts which the section refers to. Next, as regards the argument that the notice which was given by the prospectus of the contracts of the 3rd and 14th February, 1890, by the reference to their dates and parties' names, is sufficient to deprive the defendant of the right to complain of his want of information of their contents, it must be remembered that this is a case of alleged fraud in which a glowing description is given of the advantages which a shareholder may anticipate without disclosing material

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(1) L. R. 7 Eq. 154.

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unlawful conspiracy, it could give rise to no ground of action. This second ground was decided in *Kiernan's Case*(1), therefore we now rely solely on the first.

Twiss read the prospectus, and took the shares, relying on the statements in it; that distinguishes the case from *Kiernan's Case* (1). The statements in the prospectus, taken as a whole, are false: *Arnison* v. *Smith* (2); *Scott* v. *Snyder Dynamite Co.* (3). The

facts, the knowledge of which might reasonably affect the judgment of any person, and would very probably, if not almost certainly, affect the judgments of some persons in coming to a conclusion on the question of taking shares. When a vendor undertakes to describe his property for the information of intending purchasers, and to induce them to buy, it is his duty to disclose facts within his knowledge which are material to enable a purchaser to judge of the value of the property. It is not enough to state what is actually true, or what cannot be shown to be untrue, if, at the same time, material information be withheld which affects the value of the property, and would qualify the description of it actually given; and it is not open to the vendor to say to a purchaser who has accepted, and acted on the description given, without further inquiry, that he had the means of making further inquiry, and if he had done so, he would have found out the whole truth. The purchaser has the right to say I was entitled to rely on what you told me, and was not bound to assume or suspect that you were not dealing honestly and openly with me, but were keeping back what I ought to have known.

I am of opinion that what would otherwise be notice may be deprived of the effect of notice by fraud which does not even amount to actual misrepresentation, but merely consists of deception through intentional suppression of material facts. Such deception, however, may, in many cases, amount to misrepresentation. In the case of *Reynell* v. *Sprye* (1 D. M. & G. 660), Lord Cranworth said (page 710), where one contracting party has intentionally misled the other by describing his rights as being different from what he knew them to be, it is no answer to the charge of fraud to say that the party charged recommended the other to take advice, or even put into his hands the means of discovering the truth. "However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated. This principle was fully recognised in the case of *Dobell* v. *Stevens*" (3 B. & C. 625.)

A statement, true in itself, may be misleading if it be only part of the whole truth, and if the undisclosed part of the truth qualifies the statement made, or detracts from its weight. In the case already referred to of *The*

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(1) Not reported (2) 61 L. T. (N. S.) 63. (3) 66 L. T. (N. S.) 278.

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prospectus is the act of the Company, and anyone defrauded by that is entitled to get out of the liability. The promoters are bound to state everything within their own knowledge, the existence of which might qualify the statements: *New Brunswick and Canada Railway Co.* v. *Muggeridge* (1). The investors ought to have the same information that the promoters have themselves: *Venezuela Railway Co.* v. *Kisch* (2). These decisions were before

Central Railway Company of Venezuela v. *Kisch* (L. R. 2 H. L. 99), Lord Chelmsford said (page 120):—"But the appellants say that, even admitting the prospectus to be open to the objections which are made to it, the respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that the engineer's report" and other named documents "might be inspected, and any further information obtained on application at the temporary offices of the Company; and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the Company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus. But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You at least, who have stated what is untrue or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution, because I relied implicitly on your fairness and honesty.'"

I may also refer to the case of *Jury* v. *Stoker* (9 L. R. Ir. 385), and to the observations of Sir Edward Sullivan, M.R., at pages 398 and 399. Statements on the question of notice are attributed to Mr. Justice Chitty in a report which we have been shown of his judgment in *Osborne's Case* (which, however, I have not seen reported in any of the Law Reports), with which statements I am unable to agree if sought to be applied to the present case. With respect to the question as to the repudiation by the defendant of his shares, a mere intention in his own mind to repudiate them would not amount to a repudiation; but the forfeiture by the plaintiffs of the defendant's shares, of which he received notice on the 5th May, 1891, clearly, in my opinion, rendered any repudiation by him after that date as unnecessary, as it would have been unmeaning; and as the first inquiries the defendant made about the mine were soon after the 5th March, 1891, it cannot be held that he was guilty of any such the Act of 1867. You are not to take the prospectus paragraph by paragraph, but taking it as a whole to see if it conveys wrong information: *Scott* v. *Snyder Dynamite Co.* (1). In *Jury* v. *Stoker* (2) there was a statement that the vendor had put in a cash capital, whereas he had taken fully paid-up shares. The directors must act with good faith: *Ross* v. *Estates Investment Co.* (3). Here there was concealment of fact, because no ordinary man reading the prospectus

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(1) 1 Dr. & Sm. 381.

(2) L. R. 2 H. L. 113.

laches as would deprive him of his right to repudiate. The plaintiffs' position was not altered in the meantime. As I have already observed, what the actual information was which the defendant obtained as the result of his inquiries does not appear, but he took no notice of the call made on his shares, or the demand for payment of it, and he did no act amounting to an election to retain the shares, notwithstanding the result of his inquiries, whatever that may have been.

In *Clough* v. *The London and North-Western Railway Company* (L. R. 7 Exch. 26), Mellor, J., in delivering the judgment of the Court of Exchequer Chamber, said, with reference to the election to avoid a contract for fraud (page 35):—"In such cases the question is, has the person on whom the fraud was practised, having notice of it, elected not to avoid the contract, or to avoid it, or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to his right to rescind being precluded if, in the interval, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected"; and he added, "neither can we see the principle or discover the authority for saying that there should be a declaration of his intention to rescind prior to the plea."

Although lapse of time without rescinding may be evidence of an election to affirm the contract, I am of opinion that the facts in evidence in this case would not warrant the inference that the defendant elected to affirm the contract after acquiring a knowledge of the fraud in question, even if he obtained that knowledge in March, 1891, of which, however, there is no proof.

The evidence given at the trial was amply sufficient to sustain findings that the contents of the contracts of the 3rd and 14th February, 1890, were material matters to be disclosed in the prospectus; that they were not disclosed, with the fraudulent intent of concealing matters which, if known, were calculated, and reasonably likely to prevent persons becoming shareholders; that the only reference made to those contracts in the prospectus was not, as the plaintiffs knew, a reasonable means of bringing to the knowledge of persons reading it the information which those contracts themselves disclose;

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(1) 66 L. T. (N. S.) 280.

(2) 9 L. R. Ir. 385, 398.

(3) L. R. 3 Eq. 135; L. R. 3 Ch. App. 682.

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would know that the money he paid would go into one or other of two "drains." £50,000 was the entire capital called up; of that £38,000 goes into two drains: The Stock Exchange Company and The Victory Gold Mining Co. Of the remaining £12,000, £8000 goes into the same two drains, and £4000 alone is left to work the mine.

Again, the statement about the forty-stamp machine would

and that the plaintiffs believed that such reference would not, in fact, convey that information, which the defendant did not possess, and that he was induced by the prospectus to apply for the shares which were allotted to him. All this has in effect been found by the jury in their answers to the first six questions put to them by the learned Judge, and sustains the defence of fraud. The evidence disclosed many other remarkable and significant facts relating to the formation of Aaron's Reefs, Limited, and the Companies which preceded it and went into liquidation, which it is unnecessary for me to refer to in detail. Upon the findings of the jury in answer to the first six questions which were sent to them, and the conclusions I have arrived at on the question respecting notice to the defendant of the contents of the contracts of the 3rd and 14th February, 1890, by the reference made to them in the prospectus, and on the question of repudiation, I am of opinion that the verdict was rightly entered at the trial for the defendant, and ought not to be disturbed, and that the plaintiffs' motion to set aside the verdict should, therefore, be refused with costs.

I have only to add, that even if (as upon the evidence I believe) the Company of Aaron's Reefs, Limited, was promoted, not for the *bona fide* purpose of mining, but for the fraudulent purpose on the part of the promoters of obtaining money from shareholders to be applied for the promoters' private ends and gains, still I do not decide that the Company when incorporated was thereby alone rendered incapable of suing for calls shareholders who took their shares in ignorance of the fraud of the promoters. My present opinion is that a proposition of so general, novel, and far-reaching a character as this cannot be sustained in point of law, and in the view I take of the present case it does not necessarily, nor, as I think, regularly, arise for decision.

Murphy, J.:—

I am of opinion that the verdict and judgment in this case should stand. In an action brought by the plaintiffs in the Queen's Bench Division against Kiernan, the evidence given in this case, and the character and position of the members of this Company, were reviewed by the Lord Chief Justice, Mr. Justice O'Brien, and Mr. Justice Gibson. The Chief Justice in his judgment says (1):—

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(1) These extracts from the judgments in the case of *Aaron's Reefs* v. *Kiernan* are taken from a shorthand copy of the judgments supplied to the Court.—[Rep.]

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make anyone believe that the Company was in a position to turn out gold at once, while it would cost £20,000 to buy the machine. There is no prospect of good dividends likely to come to the Company. They knew that could never be realized. They knew that the Concession had been sold for £2000, that next it was sold for £150,000; that £45,000 had been spent on the mine from 1882 down, and that all the previous Companies had been failures.

The prospectus was issued for the purpose of raising £50,000, and represents this as a *bona fide* concern when it was a swindle;

"But upon the general question, I think there is evidence that the so-called Company was but a contrivance—a machine made and worked to cheat the public by false pretences, and I am of opinion that no claim made by such a Company should be allowed to prevail in a Court of law." And again he says:—"In my opinion there was evidence that the Company was of the nature which I have indicated, that its real object was to cheat the public, that it and its directors were working by means of false pretences, and I accordingly think that a jury should be instructed that if upon the evidence they arrived at that conclusion they should find for the defendant." Mr. Justice O'Brien says:—"Now I have no doubt that this Company was a common swindle, in the sense that Gilbert, who was the Company in interest though not in name or form, knew that it was a bad Company and that it was invented by him with the design of catching in the form of purchase-money the lion's share of all that could come from the public." Mr. Justice Gibson says:—"Upon some points I have no doubt. I am satisfied that there was evidence that the Company was called into existence as the result of fraudulent combination, possibly constituting a criminal conspiracy within Lord Campbell's view in *Burnes* v. *Pennell* (2 H. L. Cas. 497); that there was some evidence that contracts were made in pursuance of that combination by Larchin, an active confederate, and Pym, an unquestioning and submissive tool; that the prospectus was false and fraudulent, and that there was no *bona fide* intention to work or develop the mine, and that Gilbert was the artificer of the whole scheme." Having read the evidence, I concur in the description that has been given of this so-called Company by the eminent Judges above referred to, and I quite agree with the opinion expressed by the Chief Justice. Is it for a moment to be held that a number of persons entering into a combination of this nature, the plan of which is to promote a Company, appoint Directors, Secretary, &c., and become a duly registered Company under the Acts, issue a prospectus, get dupes to apply for shares, should then be able to say—We are in a position by law to enforce payment of the money that is to constitute our plunder, and which we are to divide. It does not appear in any part of the evidence that from the first time Gilbert with others entered into this conspiracy a single shilling the Company, therefore, cannot sue, because the whole thing is a swindle: *Oakes* v. *Turquand* (1).

The cases cited on the other side do not apply; they were all actions of deceit. Actions for deceit are all based on fraud; our action is based on the fiduciary position of the directors: *Houldsworth* v. *City of Glasgow Bank* (2); *Smith* v. *Chadwick* (3). It is said that the statement of the deed and the parties to it is enough to satisfy section 38 of the Companies Act; but here, if the deed were inspected, it would show that the first part of the prospectus was false.

of the money obtained from time to time from the public was ever applied for the benefit of any honest or innocent shareholder in this Company.

If this action were allowed to succeed, the parties forming the unlawful combination would by the aid of the Court obtain the object for which they entered into combination. As Gilbert suggests in his letter to Nicholls, properly called a letter to a confederate, the lode to be worked is not in a gold-reef but in a gullible public. Gibson, J., in his judgment, says:—"If a Company apparently honest and *bona fide* on its memorandum and articles, is in reality registered and used for the purpose of robbing the public, can it be that the Companies Acts enable this to be done with impunity where some innocent shareholders join, by establishing a conclusive presumption that the Company is by its statutory constitution innocent and lawful?" My reply to this is that the Companies Acts have no such effect. So far as the evidence goes in this case the persons who demand the money from the defendant and into whose hands it must come if recovered, are the very persons who started and established the Company for the purpose of robbing the public. To allow this action to succeed would be giving success to a gross fraud, and, in my opinion, it would be a great scandal to a Court of Justice. In the case of *Osborne* v. *Aaron's Reefs*, Mr. Justice Chitty is reported to have made the following observation:—"Bold promoters seem to rely upon the public not asking to see contracts referred to in the prospectus, and to know the law that those who take on the faith of a prospectus which refers them to the contracts cannot complain on the ground of ignorance of what is to be found in them." This appears to me to say that if a fraud is so adroitly managed that the intended dupes will not examine that which may disclose the fraud, the law will say that there is no fraud. This is entirely opposed to the principle laid down in the case referred to by my brother Andrews: *The Central Railway Co. of Venezuela* v. *Kisch* (L. R. 2 H. L. 99). I, however, found my judgment on the fact that this Company was in its inception a combination of fraudulent persons, who in this action are seeking to complete the object of their fraudulent combination. J. P. B.

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(1) L. R. 2 H. L. 342. (2) 5 App. Cas. 317. (3) 9 App. Cas. 187.

As to the question of repudiation of the contract, we rely on *Clough* v. *L. & N.-W. Railway Co.* (1). It was a case of a stoppage *in transitu*; it was a plan to defraud the Company, and the fraud was only discovered at the trial. They then tried to repudiate. *Morrison* v. *Universal Marine Insurance Co.* (2) is to the same effect. In such cases the question is—Has the person on whom the fraud was practised elected to stand by the contract?

The letter, dated 27th April, from the Company said—Pay or forfeit, and once we forfeited the shares, they were gone: *Deposit Co.* v. *Ayscough* (3).

There was ample evidence to sustain the finding of the jury.

The Solicitor-General, in reply:—

There is no misrepresentation in the prospectus, and mere puff about property, or the prospects of a Company, is not a false statement. A good instance of a false statement of fact is to be found in The Snyder Dynamite Company, where it was stated that a patent had actually been obtained; there was a statement of fact which was untrue. We say there is no contradiction between the three first paragraphs of the prospectus, and the contracts referred to in it: *Hallows* v. *Fernie* (4). As to the statement about the dividends, it is a mere guess; and in dealing with mining property we cannot be bound to an exact statement.

The Court subsequently directed the case to be re-argued by one counsel on each side upon the following three questions:—

1. What evidence of repudiation before plea exists?

2. Is repudiation by plea sufficient, having regard to *Clough's Case*, and *The Mersey Steel and Iron Co.* v. *Naylor* (5)?

3. Having regard to the pleadings, questions, and findings, what are the precise misstatements of fact in the prospectus on which the defendant relies?

John Murray, for the plaintiffs.

Ronan, Q.C., for the defendant.

(1) L. R. 7 Ex. 34.
(2) L. R. 8 Ex. 40, 197.
(3) 6 E. & B. 761.
(4) L. R. 3 Ch. 467.
(5) 9 Q. B. Div. 648.

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WALKER, C.:—

This was an action for calls. In addition to formal defences the 8th defence pleads fraud and repudiation of the contract. (His Lordship read the paragraph, *supra*, pp. 209, 210.) The particulars of the fraud were stated in the manner I shall mention hereafter. The affairs of this Company have been so recently before the Court in *Aaron's Reefs* v. *Kiernan* (1) that it would be an undue waste of time to go into the history of the Company. I went into it at considerable length in my judgment in *Kiernan's Case* (1) and the judgment in the same case in the Queen's Bench of Mr. Justice Gibson contains an exhaustive narrative of the facts. The affairs of this Company and its prospectus have also been the subject of examination and criticism in three cases in England, to which we have been fully referred during the argument. The present case differs from that of *Aaron's Reefs* v. *Kiernan* (1) in the important particular that Twiss stated in his evidence that he applied for shares in consequence of what was read to him out of the prospectus by a Mr. Gabbett. It does not appear that he himself saw one till the 31st March, 1891.

I think it would be desirable to read the statement of Twiss's evidence from the Judge's report. He said:—"I live in Co. Tipperary. In September, 1890, I heard of the Company from Thomas Gabbett, and he read me the prospectus and the reports annexed thereto. I then applied for shares in consequence of what was so read to me. What was read to me was the prospectus produced here. I sent the letter of application for shares in September, 1890. I got no acknowledgment or reply to the letter. A cheque for the £2 10*s*. was enclosed, and it came back paid. In the following January or February I wrote a letter to the plaintiffs. I received the letter of the 17th January, 1891, the duplicate allotment letter, the letters of the 22nd January, 1891, 30th January, 1891, and the 3rd February, 1891. I wrote the letters of the 19th January, 1891, the 27th January, 1891, and the 2nd February, 1891." (All these letters were read.) "The letter of the 30th January enclosed a prospectus. I read it and the reports attached thereto, and in consequence, I wrote my letter of the 2nd February, 1891, and the notice of the call on the 5th March, 1891. I then made inquiries in London about the mine. In consequence of the result of the inquiries I took no notice of the call. I wrote a letter of the 10th March, 1891, and got the reply of the 12th March, 1891. I received a letter of the 21st March, 1891, and another of the 27th April, 1891. I took no notice of that. I got notice that my shares were forfeited on the 5th May, 1891. This was the first transaction I had in shares of any kind."

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(1) Not reported.

He said in cross-examination:—"Mr. Gabbett read the prospectus through from beginning to end. He is a Limerick man, and I met him at Kilkee, were we were both staying. He said that it looked a good thing to take shares in."

So far as fraud is concerned, the trial really depends on questions 1–6, as left to the jury. I shall read them presently. There was, in my opinion, no evidence in support of questions 7 and 8, and so Judge Holmes ruled.

We decided in *Kiernan's Case* (1) that the 9th question and answer furnished no defence, and in that view also the learned Judge concurred. Mr. Justice Holmes stated that he would allow any amendment of the pleadings necessary to raise the questions arising on fraud which he left to the jury, and that the case was to be treated as if such amendments were made. He did not go further than that, and considering that the defendant had within his procurement the contracts of February, 1890, and did not rely on their concealment, the amendments sanctioned were extremely liberal. The defendant did allege specific frauds, and I think failed in proof of all. (His Lordship read the particulars of fraud pleaded.) The effect of the two contracts of February, 1890, as regards the absorption of any money received from the public, is put with great clearness by Chitty, J., in *Osborne* v. *Aaron's Reefs* (1). (His Lordship read a passage from the judgment of Chitty, J. (2).) Mr. Justice Holmes left six questions to the jury. (His Lordship read the questions and answers.) As I understand the law it is accurately stated in Lindley on Joint Stock Companies (5th ed.), p. 70, where it is thus stated:—"By the law of this country the

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(1) Not reported.

(2) See this passage quoted in the judgment of Barry, L.J., *infra*.

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duty of a person bargaining with another to disclose all material facts known to himself is confined to a very limited class of contracts. In all contracts of buying and selling the maxim is *caveat emptor*, and contracts to take shares are apparently governed rather by this principle than by any other. At the same time, if persons issue prospectuses or make statements, and fraudulently suppress material facts which render the statements made untrue, an action for damages may be sustained against them. *A fortiori*, will such a concealment support an action for rescission of contract. But such an action cannot apparently be supported by a person induced to take shares by the concealment of a material fact unless there has been some untrue statement."

I think the first three paragraphs of the prospectus are those which bear on the subject, and what is to be considered must be whether we have (*a*), an untrue statement of a material fact, and (*b*) found by the jury to be untrue. [His Lordship read paragraphs 1–3 of the prospectus.] Are these statements of intention, expectation, belief, coloured and exaggerated estimates, or are these material facts stated? That is a matter of construction of the prospectus, and a question of law. This was decided in *Bellairs* v. *Tucker* (1). In that case the jury found that the statements in the prospectus were false, as a matter of fact, and yet the judgment was entered for the defendant. Denman, J., in his judgment said:—"I think it was for the Judge and not for the jury to say whether with reference to the surrounding circumstances the statements in question were expressions of hope or belief only, or statements of existing facts."

Taking up the paragraphs of the prospectus, I think the statements "already proved to be rich" in the first paragraph does not mean proved by actual working. There is no proof that tenders were not about to be invited, and the statement as to the results of the erection of machinery is a statement of expectation. There is nothing to show that the second paragraph is not substantially accurate. Much stress was laid on the third paragraph. It is said to be obvious that money would not be available out of the first issue of shares to purchase a forty-stamp mill. The application of the proceeds under the contracts does show that; but there could be other issues of shares, and the purchase-money necessarily should be first provided for. The words "in the first instance" do not mean "at once," but "at first," and I do not see how this third paragraph involves the statement that at once the mine would be a dividend-paying concern. The words that the mine "would readily and speedily pay dividends to the extent of £100 per cent." are, on the face of them, an estimate, and the expression of hope. There is really nothing to show that the statements in the remaining three paragraphs of the prospectus are untrue, though they may be coloured.

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(1) 13 Q. B. Div. 562.

I am inclined to think the statements are of expectation, belief, and intention. But assume that the Judge, if asked, would have ruled that these were statements of existing material facts, what findings of a jury have we to rest on as to the untruth of what is in the prospectus?

I do not find any such specific finding. So far as regards the question of concealment, I think the opinion of Mr. Justice Andrews in the Court below cannot be reconciled with that of Mr. Justice Chitty in *Osborne* v. *Aaron's Reefs* (1), and so Mr. Justice Andrews assumes.

Much argument was addressed to us on the 38th section of the Act of 1867. I am quite willing to assume that this section does not by compliance with it give any protection to concealment of material facts in a prospectus where such concealment can exist consistently with the statement in it of contracts by dates and parties. The section does, I think, proceed upon and recognise the general rule that a man cannot plead ignorance of the contents of documents to which he is referred with sufficient particularity. So far as it is applicable it has been complied with, and the special consequences created by the section of making the prospectus fraudulent avoided. I am, however, willing to deal with the case as if that section had never been passed, and there had been this reference to the contracts by dates and parties in the prospectus.

I do not see how in such a case a matter can in the true sense be concealed, of which in a court of law a man is to be deemed to have notice. Sir George Jessel says, in *New Sombrero Company* v. *Erlanger* (1), speaking of a contract referred to :—" If the shareholders had gone to see it (and I think in a Court of Justice they cannot complain that they did not see it, but must be treated as having notice of its contents) they would have found," so-and-so, and I think that is what Mr. Justice Chitty means by his observations in *Osborne* v. *Aaron's Reefs* (2). I assume, for the purpose of the case, that a Company issuing a prospectus referring to contracts by dates and parties is in no better position since the Act of 1867 than it was before.

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(1) Not reported.

The rule of law as to the effect of omissions and non-disclosures in a prospectus is stated in *Gover's Case* (3) by Lord Justice James at p. 189, and Lord Justice Brett, at p. 198 in a manner which I entirely adopt. James, L.J., says :—" No doubt a Company is liable to have its contract with its shareholders rescinded if its prospectus contains false statements, or omissions amounting to false statements," *i. e.*, as I understand it, if there is an omission of the statement of some facts which makes the partial statement untrue. Brett, L.J., says, speaking with reference to section 38 :— " It is a section which is to be construed with regard to the state of the law at the time when it was enacted. Immediately before this section was passed the law was this : if a subscription for shares in a Company was obtained by a fraudulent misrepresentation or by a fraudulent concealment so great as to make that which was stated in effect a misrepresentation, the Company could not, either by action at law or in the course of any proceeding in equity, enforce payment of any call made in respect of such shares, and the shareholder could recover back money paid as for calls on those shares and the shareholder could obtain the removal of his name from the register of shareholders. If a subscription for shares were obtained by a mis-representation of facts, though not fraudulently made, a Court of Equity would prevent the Company from compelling payment of a call, would compel restitution of money paid for a call, and could and would remove the name from the register of shareholders. But for a mere non-disclosure, fraudulent or otherwise, which had not the effect of rendering that which was disclosed or stated a misrepresentation, however otherwise important for the consideration of an invited subscriber, there was no remedy either at law or in equity if he became a registered shareholder." This seems to state the law with perfect accuracy.

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(1) 5 Ch. Div. 111. (2) Not reported. (3) 1 Ch. Div. 182.

I think *prima facie* the shareholder is to be charged with knowledge of what is contained in contracts referred to in a prospectus, the contents of which are not set forth; but if a prospectus contains an affirmative statement as to material facts with which the contracts are also conversant, and such statement is shown to be, and is made, untrue by the contents of the contracts referred to, but not stated, then I think the misstatement of fact in the prospectus may be relied upon as a misrepresentation and fraudulent, and the Company cannot be protected by the imputed knowledge which the shareholder has. That involves—1, that the prospectus does contain affirmative statements of fact of a material character; and, 2, that they are untrue, importing into them what is contained in the contracts. I do not think the rule can be put more strongly in favour of the defendant than this.

The construction of the prospectus is for the Judge, and is a question of law, and the truth or untruth of the statements in it is a question of fact for the jury.

I cannot find any requisition addressed to the Judge or any ruling of his as to any statements in the prospectus with which the contracts are conversant, and there is no finding of the jury as to any of such statements, except as regards questions 7 and 8. No statement in the prospectus as to any fact is challenged by questions to the jury or by findings. It seems to me, therefore, impossible to enter a verdict for the defendant on the questions of fraud, and if fraud be out of the way, there is nothing to displace the plaintiffs' case.

But independently of this, I think that when a shareholder, once such is sued for calls, or when he takes proceedings to rescind the contract, it is a necessary part of his case to establish—1, that he repudiated the shares with all benefits and burden attached to them; and, 2, that he did so within a reasonable time after he had knowledge of the circumstances, which gave him the right of rescission.

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The case of *Clough* v. *London & N.-W. Railway Company* (1), is one of the highest authority, and it establishes that, in the case, at all events, of the sale of goods, the fact that the contract was induced by fraud does not render the contract void or prevent the property from passing, but merely gives the party defrauded a right, on discovery of the fraud, to elect whether he will continue to treat the contract as binding, or will disaffirm the contract and resume his property.

In the judgment the rule is stated thus:—"In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

I think that this rule does not, as stated, apply to the case of a contract by an individual to take shares in a Company, or if it does, that such contract is from the nature of the thing necessarily within the saving attached to the rule. Upon this point I shall refer to some cases. I do not refer to those in which a winding-up order intervened, which brings in a different principle.

In *Ogilvie* v. *Currie* (2) the shares were allotted in June, 1865. Towards the end of the year the suspicions of the plaintiff were aroused. On the 30th May, 1866, the fraud was discovered; on the 29th June, 1866, an action for calls was commenced; on the 5th July, an appearance was entered; on the 21st July, notice of repudiation was served; on the 28th July, the winding-up order was made; and on the 27th March, 1867, the bill was filed. After the 30th May the plaintiff hoped steps would be taken by the directors to set matters right. If there was a change of solicitor and auditor the plaintiff was willing on that basis to remain. In giving judgment Lord Cairns said:—"Now, I should be prepared to hold that the circumstances which I have mentioned,

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(1) L. R. 7 Ex. 26.

(2) 37 L. J., Ch. 541.

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the preparation which this gentleman had before the 30th May, and the time he allowed to pass between the 30th May and the 21st July, in a case of this kind, were such as to prevent him repudiating these shares, and to fix him with the liability upon them."

In *Jackson's Case* (1) the application for shares was made on the 15th April, 1865. In May or June, 1866, the applicant had notice of the departure from the objects of the Company, as stated in the prospectus. On the 14th November the applicant wrote to the Secretary in reply to a notice of the 30th October, 1866, to strike off his name from the list of shareholders. On the 11th March, 1867, he applied to the Court to have his name removed from the list of shareholders. Page-Wood, V.-C., in giving judgment, said:—"I must hold that he had distinct and deliberate notice in May and June, and there had been abundance of time for him to have applied before the first offer of a compromise had been held out in the month of October. In the case of Mr. Stewart he had applied the very day after he had knowledge of the facts."

In *Lawrence's Case* (2), which was a case of variance between the prospectus and the memorandum, the application for shares was made on the 4th September, 1865, on the faith of the prospectus. On the 7th October the shares were allotted; on the 14th October the allotment money was paid; on the 16th May, 1866, the discovery of the variance took place; and on the 27th September, 1866, notice of repudiation was served. Lord Cairns said:—"If asserted, it could not be asserted with effect unless asserted promptly and distinctly. No attempt at repudiation took place for upwards of four months."

To the same effect is *Kincaid's Case* (3). In that case the shares were allotted on the 29th April, 1865; and on the 25th April, 1866, Kincaid paid the first instalment of a call. The order on appeal in *Stewart's Case* (4) was made on the 17th July, 1866; and on the 18th July, 1866, Kincaid applied to have his name removed from the register; but it was held that from the 25th April, 1866, to the 18th July was too long to wait.

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(1) 16 L. T. (N. S.) 278.

(2) L. R. 2 Ch. 412.

(3) L. R. 2 Ch. 420.

(4) L. R. 1 Ch. 574.

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In *Taite's Case* (1) the shareholder, on the 2nd July, 1866, gave notice that he would apply to the Court unless within three days steps were taken to remove his name from the register. On the 3rd July, 1866, the directors stated that they would oppose the application. The matter was allowed to stand over, yet it was held that the delay between that and the Long Vacation was fatal. In the words of Page-Wood, V.-C., "the plaintiff waited for a whole month."

In *Heymann* v. *European Central Railway Co.* (2), where there was a delay of three months, Lord Romilly said:—"It is obviously of the utmost importance in these cases that a shareholder should come at the earliest opportunity before other persons have entered into engagements with the Company upon the faith of his being a member of it."

In *Kisch's Case* (3) the delay was two months; and on the facts it was held that the plaintiff was not precluded from relief. Lord Romilly in his judgment said:—"I would observe that a contract between a Company and an individual differs from a contract between two individuals alone in this respect, that upon the faith of his becoming a member of the Company various persons are induced to deal with the Company and to become shareholders, which they would not do except upon the belief that he was a member of it. The result is that it becomes necessary for him, in order to set aside a contract of this description, that he should come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member of the association."

In *Scholey* v. *Central Railway Co. of Venezuela* (4) Lord Cairns said:—"He would assume in favour of the appellant that if he had come quickly after the 15th March" (a date at which knowledge of misrepresentations in the prospectus was attributable) "the Court would have given him relief. He certainly thought that the Court would be most careful to see, in a Company going on and trading, in which the rights of the shareholders and others varied from day to day, that a person coming to complain of misrepresentations of this kind, and coming to avoid a voidable contract, came within the shortest limit of time which was fairly possible in such a case." That was a case of fraud; I only refer to it for the observations of Lord Cairns.

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(1) L. R. 3 Eq. 795.

(2) L. R. 7 Eq. 169.

(3) L. R. 2 H. L. 99.

(4) L. R. 9 Eq. 266 n.

In *Re Scottish Petroleum Company* (1) the facts were:—On the 10th November, 1880, Wallace applied for ten shares on the faith of one Gibson being a director. On the 15th November notice of allotment was received from the secretary, and along with it a letter notifying Gibson's retirement. On the 27th November Wallace withdrew his application asking for allotment of shares, and asked for return of the deposit of £10. On the 3rd December the solicitor of the Company wrote to say that the directors would not do so. On the 8th December the secretary applied for the £20 payable on allotment. On the 10th December Wallace again applied for return of the £10: nothing more was done. Wallace got notice of the two general meetings in February and May, 1881; and on the 27th May, 1881, the order to wind-up was made. It was argued that after the repudiation on the 27th November it was the duty of the directors to remove the name. The summons to have the name removed was issued in July, 1882. It was held by the Court of Appeal that the repudiation was not in time, and the judgment of the Court relied on the period between the 15th and the 27th November, 1880, as being too long.

In *Skelton's Case* (2) the prospectus was issued in February, 1889, and the application for shares was made in the same month. In July, 1889, the plaintiff received a circular from Scott, another shareholder, stating that he was bringing an action for the return of his money. The plaintiff then had communications with a director named Schultz, who stated that Scott's allegations were groundless. On the 19th February, 1892, judgment was given in Scott's action, rescinding the contract. Proceedings were then instituted on the 21st March, 1892. The resolution for voluntary winding-up was passed on the 25th March, 1892, four days after the proceedings were taken. This is a remarkable case, as in the same Company Scott was let out on the ground of fraud. [The Lord Chancellor read the judgment.] This case shows there must be repudiation, and within a reasonable time. The law corresponds with the settled course of pleading. If this is part of the defendant's case to found a defence it is not found. Questions 10 and 11 do not raise it. The correspondence in the present case is most important on this question of repudiation.

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(1) 23 Ch. Div. 413. (2) 9 *Times*' Rep. 213.

The Company was formed on the 16th January, 1890. In September, 1890, the defendant applied for 100 shares on the faith of a prospectus then read to him. By the prospectus £2 10*s.* was payable in respect of these on application, and a further sum of £2 10*s.* on allotment. He sent a cheque for the £2 10*s.* in September, but did not receive any acknowledgment, and he wrote on the 15th January, 1891, and received a reply on the 17th January, 1891. From that it would appear that the shares were allotted on the 24th October, and then his further payment of £2 10*s.* was due.

It is not pretended that there was repudiation by declaration or notice. Holmes, J., says:—"I was disposed to think the repudiation was not needed, having regard to the forfeiture of the shares so soon after the inquiries by the defendant." The question to the jury was, "Did the defendant by not paying calls intend to repudiate the shares, and was such a repudiation within a reasonable time after discovering the misrepresentation of the prospectus?" and the answer was—"Yes." "If not, had the defendant reasonable time to repudiate his shares after the discovery of the misrepresentation and before action?"—No answer. "*By not paying calls.*" There is no other suggested. It would be strange if the omission to discharge a debt when asked for it, and keeping absolute silence, were to be equivalent to a repudiation of the obligation.

Then it was strongly pressed that the forfeiture of the 5th May did away with all necessity of electing to avoid the contract of the shareholder. I do not think this is so, and at all events it would not affect the period up to the 5th May. The notice of the forfeiture conveyed to Twiss, who is fixed with knowledge in point of law of the articles, the following intimation of what his position was:—We, the Company, have forfeited your shares, but you remain liable to the calls by reason of your contract of shareholder, and you are still a past member, liable by virtue of your contract to the debts due at the date of the forfeiture, and, if a winding-up happens, liable to be treated as a past member. That is a very different *status* from that of one who has repudiated the contract of shareholder, and who could recover back his deposit and allotment-money. I do not say that a shareholder sued for calls may not elect for the first time by plea to avoid the contract, if the facts warrant his doing so at that period. That is not the plea in the present case, nor is there any finding of reasonable time directed to it. I think, therefore, that it lay on the defendant, in order to escape from liability, to prove as well as plead repudiation, and repudiation within a reasonable time, and that he has not done so.

In result I am of opinion that the plaintiffs are entitled to judgment for the sum claimed.

PORTER, M.R. :—

I concur in the opinion arrived at by the Lord Chancellor, and should be content to rest my judgment on the reasons which he has expressed; but as we are differing from the other members of the Court and from the Judges of the Exchequer Division, it is right that I should state the grounds for my decision in my own words.

The action is brought to recover the amount of a call upon certain shares against a person who was at one time, and when the call was made, admittedly a shareholder. The circumstance of the subsequent forfeiture of his shares prevents him from now being a shareholder; but the legal liability depends on the existence, or non-existence, of fraud in the circumstances under which he became a shareholder. Therefore I do not think that, on this point, any different consideration arises from what would have arisen if this had been an ordinary action against Twiss, as a shareholder.

The principle of *uberrima fides* as applicable to such cases as the present is fully recognized and is in terms enunciated by the highest authorities in *New Brunswick Company* v. *Muggeridge* (1) and in *Kisch's Case* (2). But mere exaggeration is not enough to establish its violation, because the *uberrima fides* required is good faith as to the disclosure of material facts, as distinguished from opinions or prospects. Numbers of cases, such as *Ross* v. *Estates Investment Company* (1) establish this; and the suppression, when suppression is relied on, must be of material facts, the non-disclosure of which renders what is stated untrue, that is, fraudulent in the sense in which a Court of Equity would so regard it. And this is admitted in *Houldsworth* v. *Glasgow Bank* (2); *New Brunswick Company* v. *Conybeare* (3); and *Jackson* v. *Turquand* (4). The question turns on the effect of the prospectus, both as to what is stated and what is not stated in it.

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(1) 1 Dr. & S. 363.

(2) L. R. 2 H. L. 99.

The prospectus states the existence of the Company and the fact of its registration; that it was to have a capital of £200,000 in 5*s.* shares; that this was the first issue of 200,000 shares, on which 6*d.* was payable on application and 6*d.* on allotment; and that there was to be no further call that year. It then states:—"This Company has entered into a contract to acquire the Concession La Victoria, forming part of the well-known mining property of the Victory Gold Mining Company in Venezuela." This statement is true. The contract is afterwards referred to expressly and in the manner required by the Statute. Was an intending shareholder to assume from this prospectus that the Concession La Victoria was to be obtained for nothing? If so, it was a free gift from the Victory or the City Stock Exchange Company. Could anyone believe that? If, then, this contract by a Joint Stock Company was a contract of sale, the intending shareholder has notice that a price is to be paid. What price? He is in effect referred to the contract. Why does he not ask before he contracts to take shares, or abstain from taking them because he does not know the price? Had he asked, he must have received an answer, or no answer. If he received an untrue answer he would have had good ground to rescind his contract on learning the truth. If he received a true answer, or none, he would have gone on at his own risk, or declined to go on at all. If he had received a true answer and become aware of the price to be paid for the mine, the thing for him to consider would be, not so much who is to get the money, as whether the mine is a real mine, and worth the price to be paid for it. If the price was to be paid to an unconvicted, or even a convicted swindler, the shareholder has small concern with that in comparison with whether a good title has been acquired and a good bargain secured.

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(1) L. R. 3 Eq. 122.

(2) 5 App. Cas. 317.

(3) 9 H. L. Cas. 711.

(4) L. R. 4 H. L. 305.

The prospectus then says:—"A property which has already proved to be rich." Although that is a statement upon which much reliance was placed, and as to which it was contended that it meant that the mine had been proved to be rich by actual working, it obviously meant nothing of the kind, but only that it had been proved (that is found), to be rich by the examination of competent persons; and this was the view taken by Mr. Justice Holmes. The next statement in the prospectus which was relied on was that the mine—1. "Requires only the erection of machinery, &c." That it did require the erection of machinery is of course plain; that it required anything more has not been shown. If this was a workable mine at all, and if it was such as described, this statement must be taken to be true, or at least not shown to be untrue, so as to be fraudulent. 2. "Tenders for which are about to be invited." This may have been really intended, and there is some evidence that it was. In any case it would be in the power of the Company (*i. e.* the shareholders) after its constitution to secure it. 3. "To be at once in a position to make returns." This does not mean that returns could be made immediately when tenders were invited, or even obtained. It means, immediately after the erection of the machinery and the starting of the mine.

The next paragraph states:—"The assays have all been made by competent authorities from fair average samples of the different lodes and not picked specimens (*vide* reports)." This statement is not shown by any evidence whatever to be untrue, and so the Judge at the trial held. The reports were actually made, and though they may be highly coloured, they were made by persons whose competence was not impeached, and there is nothing to lead me to believe that they were dishonest. For all that appears, they may be perfectly accurate. They were undoubtedly made; and as regards the Company, the fact of using and publishing them is no evidence of fraud. I may add that a perusal of several of Nicholl's letters has satisfied me beyond all doubt that he thoroughly believed in the mine.

"It is proposed, *in the first instance*, to erect a forty-stamp mill and make additions from time to time to the mine, as the increased output may render necessary." There is nothing in this statement which is shown to be untrue, apart from the inference sought to be raised by the subtle argument founded on the financial position of the Company. The argument is this:—The prospectus is conversant (it is said) with an issue of 200,000 shares. Supposing these to be all taken up and paid in full there would only be £50,000 available to start the Company, and probably less, considering preliminary expenses. But of the £50,000 to be raised from the public, £19,000 would go to the Victory Company, £19,000 more to the Stock Exchange Company, making £38,000, and two-thirds of the balance (£12,000) also to the last-mentioned Company, leaving only £4000 available for working capital. This £4000 would of course be reduced by a share of the expenses of founding and starting the Company. Practically none of the £50,000 therefore would go to working the mine at all. There would be no money for a stamp-mill or any other purpose. Therefore the statement, "It is proposed, *in the first instance*, to erect a forty-stamp mill," is necessarily untrue.

There is some evidence that a forty-stamp mill would cost between £20,000 and £30,000, that is, I presume, erected at the place. [His Lordship read part of the evidence of Nicholls.] It is not alleged, so far as I have heard, though it may be, that there was any fraudulent concealment of the fact that a forty-stamp mill would or might cost between £20,000 and £30,000, nor was any issue raised about it. If then that fact was not concealed, but was one which an intending shareholder might ascertain for himself without difficulty, and was a fact not specially connected with the affairs of Aaron's Reefs, but of general knowledge, an intending shareholder would have notice, or the plainest means of knowing, that out of the £50,000 to be raised by the first issue, the expenses of the formation of the Company would have to be provided for, and these probably would be large, and all the other outlay which must be incurred, including the possible expenditure of £20,000 or £30,000 for the forty-stamp mill, before the extraction of gold from the quartz could be an accomplished fact. That intending shareholder

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would be sanguine if he supposed that all these things could be provided for out of the £50,000, and leave a surplus adequate to buy such a mine as the prospectus describes. I have shown that the prospectus states a purchase of the mine by Aaron's Reefs and not a gift. Where, then, was the purchase-money to come from? The answer, if the inquiry were ever made, must necessarily be, not at any rate out of this £50,000, and that answer must be given whether the inquirer did or did not know the particulars of the contracts of sale and purchase.

But the ignorant, though anxious, inquirer who asked these questions of himself or anyone else would straightway be met by the reply: "That is so. The price, which must be very considerable, and may be very large, will have to be provided for out of the share capital, though it cannot possibly be met out of this £50,000. But then the share capital is not £50,000 but £200,000. This £50,000 is merely a first issue. There must be other issues making up the required amount, whatever it may be, and it will be matter of necessity to make them." Thus I think it clear that if anyone read this prospectus in the critical way I have assumed, he must know that the capital would have to be raised by further issues of shares; and it is only by such minute and critical reading of it that the inference of fraud can be raised at all.

Is there, then, anything in the prospectus to indicate the contrary—that is, to indicate that out of the first issue of 200,000 shares everything needful to start and work the mine will be provided? I confess I cannot see it.

There are just two passages relied on as implying this:— The first is to be found in the paragraph I have already read (paragraph 1). But this does not say or imply that returns can be made as soon as the £50,000 of the first issue is called up. In any view of it, the machinery must be tendered for, contracted for, made, exported, erected and started, before this result could be realized. To make £20,000 or £30,000 worth of machinery cannot be accomplished in a day. It is a very large job, and must take a considerable time. The prospectus, no doubt, does not name a time, and indeed says it requires *only* the erection of machinery, after which returns may *at once* be expected. But it would be absurd to say that such a statement is fraudulent as inducing shareholders to suppose that on payment of their share calls they will immediately begin to earn and receive dividends. That consequence can only follow the working of the mine, when started with adequate machinery. The capital is stated to be £200,000. The issue in question is stated to be only a first issue. I fail to see how anyone could say he was misled by this statement into supposing that there were to be no other issues (so that the £50,000 in question was to receive all the profits of the mine), or into believing that the mine was to be worked with one quarter of its capital. In the case of one who really considered the matter on the prospectus itself I have shown that he must have ascertained the contrary, and this statement certainly does not conflict with that obvious inference. The defendant never suggests that he, at least, was so misled.

The other passage relied on is the 3rd paragraph. The words are: "It is proposed in the first instance to erect a forty-stamp mill." Now, do the words "in the first instance" fairly mean *at once* and immediately on the allotment of these 200,000 shares, without the issue of further capital? I think they do not. With every disposition to construe any doubtful expression favourably to the defendant, common fairness seems to me to forbid such a contention. "In the first instance" plainly means *at first*. When the mill is first started, it is intended to be started with a forty-stamp machine. Afterwards that may be increased. The reference is to the working of the mine when started, not to the instantaneous creation of such machinery out of the first issue. At the very lowest the language is perfectly capable of that meaning. I think that it is its actual meaning.

The following words, however, were also relied on;—"An average yield of only 1½ ounces per ton would give a return of 3600 ounces per month, value nearly £14,000, the greater part of which should, owing to the working facilities, be available for distribution as dividends, and (it is not unreasonable to anticipate), the mine should readily and speedily pay dividends to the extent of 100 per cent." If this passage meant that a yield of 3600 ounces of gold per month, value for £14,000, the greater part of which would be profit, would pay 100 per cent. on the entire capital of

£200,000, the statement would be demonstrably untrue on the figures, for if the £14,000 were all profit, it would only amount to £168,000 per annum; and the statement is only that something more than half of that sum would be profit.

It is said this proves that the reference must be to an invested capital of less than £200,000, less even than £168,000, and may mean only a capital of *something* more than £84,000. Even if so, this would show conclusively that the figures were inconsistent with, or at least not based upon, the first issue of £50,000. But is the statement, when fairly read, that 3600 ounces per month would give this result? I think not. The yield is taken at 1½ ounces per ton. The reports and assays, if true, show that it was expected to be greater than that, 4 ounces or so per ton; and the conclusion of 100 per cent. is only put as a not unreasonable anticipation of something that might happen in the future, the near future, no doubt, but still an anticipation, founded upon a hopeful view both as to the yield of gold per ton and the expected development of the mine. If calmly read, without reference to the fact that one Gilbert has been called the head of a gang, and another Gilbert is or was in prison for some unexplained cause, and that this Victoria Concession has been dabbled in before by people who never meant to work it as a mine, I do not think the inference can fairly be drawn from these words that the first issue of shares was to be the only issue, or was to lead of itself to these very tempting results. Thus there is no statement in the prospectus, express or implied, contrary to what is contained in the contracts of sale referred to. It is a different question (and I shall refer to it presently), whether the non-disclosure of the contents of the latter is of itself evidence of fraud, I am aware that minute criticism of the words of a prospectus is seldom desirable. But when a particular construction is sought to be placed upon such a document, with the view of establishing, *by means* of minute criticism, a contradiction between what is said and what is not expressed, it is not only right but necessary to see clearly what the paper contains, particularly in a case where the shareholder does not say that he was in fact deceived into believing, or did believe, what is now said to be untrue.

The remaining statements in the prospectus itself are :—

(*d*) "The special and peculiar features of this property are well-defined lodes and enormous outcrops, containing payable gold.

(*e*) "The extracts from reports by gentlemen of repute are worthy of great consideration. The directors feel that absolute reliance can be placed upon them.

(*f*) "Every expert who has visited this property testifies to its worth, and the *consensus* of opinion of many experts is that it must prove to be one of the richest mines in the world."

These passages refer not to the finances of the Company, but to the property acquired for it. They may be highly coloured. It is very high praise of a mine to speak of its "well-defined lodes" and "enormous outcrops containing payable gold," of its wealth, and of its prospect of becoming "one of the richest mines in the world." But where is the fraud? I regard this part of the case as of the very highest importance, because I am disposed to think that it was probably on the faith of these statements that the shareholders in general, and possibly the present defendant, took their shares. Now there is literally no evidence at all that these statements, even if highly coloured, are untrue. The mine has never yet been worked. There is nothing to show that the reports and trials have not been honestly made. The evidence of Larchin, and more particularly of Nicholls, goes far to prove that a real belief in the value of the mine, and of its possibilities, was entertained, and might reasonably be held by them. The letters of Nicholls, the manager in Venezuela, satisfy me that he, at least, honestly believed in the mine as a first-class speculation, and these letters, of which numbers were handed up to us, were not written for the purposes of a prospectus, or of a trial at law. This evidence is answered by no opposing testimony. As Holmes, J., said, "It would be an unusual thing for a jury to reject uncontradicted evidence." The mine has no doubt kept bad company; but that is not its fault. A disreputable individual may possess a precious jewel, and an honest person who buys it, though from a tainted source, depends on its inherent value, and not on the history or antecedents of its former owners, unless it was stolen. The findings of the jury in this case, which go to establish that the mine was not a reality, not proved rich and soforth, are not supported by evidence, and are contrary to the evidence so far as it goes. They are of no value, and were so treated by the learned judge who tried the case.

The fraud, then, if fraud there be, must consist in the non-disclosure of matters which ought to have been revealed—that is, of the price to be paid for the Concession. Apart from price another matter was relied on, viz. the history of the Companies which had formerly owned the Concession. This, however, seems to me, in the case of a mine admittedly never worked, almost immaterial, certainly non-essential. What matter is it, to persons intending to work a mine, whether former owners who had bought and sold it for private gain were honest people or mere adventurers, or even rogues? The fact that they intended to work the public and not the mine leaves the question of the intrinsic value of the mine untouched. The Company, as a Company is, no doubt, bound by the prospectus. If the prospectus is fraudulent, the Company must pay the penalty. But the Company is not the same thing as the promoters. The Company, a separate entity, consists of the shareholders; and the present action is by the aggregate shareholders to compel Mr. Twiss to fulfil his contract with them, and he must do so, unless they, and not the promoters only, or the previous owners of the Concession, have placed him in his position of shareholder by fraud which he can rely on as a defence to their action. Was the Company, Aaron's Reefs, bound to place upon its prospectus a statement that the Concession had formerly been owned by Stock Exchange speculators who never intended to work it, but only meant to make all the money they could out of trading upon it in London? I think not. They tell the public from whom they bought it. Apart from its value and its price, what more concerns the intending shareholder? It is not the good-will of a business, but a tangible physical possession. A man who buys a horse under the hammer, if he gets the horse, has no right afterwards to repudiate the purchase, because the horse has been sold by the assignees of a bankrupt blackleg

But there still remains the non-disclosure of the heavy price paid, and to be paid, for the Concession. Is the omission to state this in figures enough to avoid a contract on the ground of fraud? In the present case, and for the purposes of this action, I am clearly of opinion it is not.

Apart altogether from the statutory requirements as to the disclosure of contracts, as provided for by the 38th section of the Companies Act of 1867, in the present case there was enough to give notice to the public that not only a price, but in all probability a large price, was to be paid for the concern. The fact of a sale is disclosed. That sale was by a limited Company, which it also appears had bought from another limited Company. Neither of these transactions could be a gift. The fact shown on the face of the prospectus that Larchin was a director of the Victory Gold Mining Company as well as of Aaron's Reefs would negative the idea, if it occurred to anyone, that this property, represented as being so flourishing and valuable, was to be acquired by the latter through a fortunate accident, or from vendors ignorant of its worth. The proportionally large capital of £200,000 would indicate that the Concession, if valuable, was also costly. Above all, the documents of sale are referred to, so that one who considered the matter at all could acquire the information he wanted at the expenditure of a postcard. Without saying that *caveat emptor* applies in all cases of purchasing shares, yet certainly it seems to me that this was a case in which some inquiry should have been made, and in which the abstention from making it ought not to liberate the shareholder from his bargain on the ground not merely of non-disclosure but of fraud. This view is confirmed by the Companies Act, 1867, sect. 38.

I by no means think that there may not be cases in which the statutory provisions as to contracts may have been complied with in terms, and yet the bargain may be vitiated by fraudulent concealment. This would be so if the prospectus contained statements inconsistent with the contracts; and it was on that ground that this case was chiefly argued. I have dealt with that view already. I do not say that there may not be cases in which simple non-statement of material facts would be sufficient; but it does appear to me that when the concealment relied on is the non-disclosure of the terms upon which the property of the Company has been acquired, it would be going a great way to hold that that of itself would be a fraud. It would have been so easy for the Legislature to have added to the statutory requirements of names, dates, &c., the "consideration, if any, is to be stated." The specification of certain particulars which are to be stated is, on the face of the section, enacted for the protection and benefit of shareholders. The absence of these particulars makes the prospectus fraudulent on the part of promoters, directors, and officers, knowingly issuing it, unless the shareholder shall have had notice of the contract. That must mean notice of the particulars which ought to have been, but are not, specified in the prospectus. It is true that section does not deal with the relations between shareholders and the Company itself; but it would be a strong thing to hold that the non-disclosure of particulars, not required to be specified by promoters, could be a fraud by the Company. The section was intended to protect the shareholder against the deception too often practised in the creation of companies by insuring him "full information as to all the material circumstances attending the formation of the Company he is invited to join antecedently to the issuing of the prospectus." So said Cockburn, C.J., in *Twycross* v. *Grant* (1). Such "full information" is not given *in words* by stating the "dates and names of the parties" to a contract, yet it is to be deemed to be given. How? By giving notice of the contract, and putting the intending shareholder on inquiry as to its terms. If such notice is notice in reference to the promoters, &c., why should it not be notice in reference to the Company? I think it must be held to be notice of all the "material circumstances" in both cases alike, or at the very lowest of the first and most obvious and necessary and material circumstance of all, viz. the price to be paid by the Company under the specified contract. In *Ex parte Briggs* (2) Lord Romilly said:—"Most certainly under these clauses the society might become a mere bill-discounting society, and it is, in my opinion, equally certain that there is nothing in the prospectus to lead to such an expectation. The strong inclination of my mind is, however, after the last clause in the prospectus, that any person applying for shares must be deemed to have notice of the contents of the Articles of Association. He is informed of their existence, and is, in fact, thereby invited to examine them, in order to test the truth of the prospectus. I admit the correctness of the arguments founded on those cases which lay down that a man cannot complain that his solemn assertion has been believed and acted upon; and if the prospectus had contained a clause withholding the power contained in the 69th clause of the Articles of Association, or the clause in the Memorandum of Association which I have read, I should not have held that any person taking shares could have been fixed with knowledge of clauses in the articles diametrically opposed to, and contradicted by, the prospectus. But in all these cases, and in all those matters which are not contradictory to the prospectus, but are compatible with it, I think that the applicant for shares cannot plead ignorance of the clauses of the Articles of Association, which profess to execute the objects of the prospectus, even if they go somewhat beyond it, unless they are wholly incompatible with it." Those are sound observations, and seem to me to have a direct bearing on the present case, though, of course, there was in *Ex parte Briggs* (1) no reference to the statute which was not then in existence, and the reference was not to the prospectus, but to the Articles of Association.

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(1) 2 C. P. Div. 539.

(2) L. R. 1 Eq. 483.

I cannot part with this branch of the case without saying that the distinction between the Company and the promoters of it has been to some extent lost sight of in the case before us. The Company consists of a number of shareholders personally innocent of fraud, and one and all, or, at least most of them, duped, if any of them have been duped, by its promoters. For the prospectus, the Company is answerable, constructively, but really. Still when we are dealing with interests that concern the aggregate shareholders and not the promoters, it is not too much to say that strict proof of fraud must be given before one of the number can be discharged from liability, leaving the rest to bear the greater burden. Such phrases as a bubble Company, a swindling Company, and the like, are loosely used when the meaning is that the Company has been got up by dishonest persons, gangs or otherwise. To say that a Company promoted for illegitimate objects, not for the real benefit of the shareholders, ought not to have been promoted at all, and that no prospectus should, under such circumstances, have been issued, is undoubtedly right and just; but when the Company has been established, and called into existence, it is a Company, and arguments valid against its promoters may be irrelevant or futile against persons who have honestly put their money into it.

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(1) L. R. 1 Eq. 483.

So much for the fraud relied on as the case was presented in argument. How does the matter stand on the case as presented in the pleadings and as found by the jury?

On the pleadings the case is clear. Every issue ought to have been found by the jury, and if not so found, ought to have been directed in favour of the plaintiffs. And I must say that when a case has been so clearly, carefully, and ably developed in pleading, it is a strong thing to cast the pleadings to the winds, and try the case as if it were a civil bill, or as if all the issues were raised in the elaboration of some grim jest. There was the jury, ready to find any question, no matter what, against the plaintiffs, with evidence or without evidence, and against the only evidence in the case and in favour of our fellow-countryman Mr. Twiss. And they found them accordingly, as the Judge certifies. Yet, concededly, none of their findings on any one of these issues (so far as they were left to them, that is so far as they were not admitted to be proved for the plaintiffs) can be supported for a moment in a Court guided by legal principle.

Well, on the pleadings the case could not be argued. But some questions were left to the jury not raised in pleading. It does not appear from the report that any objection was made to these additional questions being so submitted; though it is to be observed that the report of the learned Judge does not state (unless by implication and that by no means clear) that the Solicitor-General asked for a direction on any issue or issues whatever in the case; yet he did so ask, beyond any doubt and without question before us.

These supplementary questions, however, were left, and they were these:—[His Lordship read questions, 7, 8, 9, 10 and 11.]

The case was therefore tried as if it had been submitted to an arbitrator without pleadings to be decided on general principles of morals and in conformity with what the arbitrator thought ought or ought not to be. It is of course to be remembered that these questions were left to the jury (as the learned Judge understood) without objection, and it was similarly understood that any amendment necessary to support them was (if required), to be made, or to be supposed to have been made.

What, then, are these questions and findings when carefully considered? And in considering them I assume that they were properly left, so far as the learned Judge did submit them, and that they ought to have been submitted, only suggesting that the findings for which Mr. Justice Holmes thought there was no shadow of foundation, reflect some light on the spirit in which the jury approached the discharge of their duty, taking what is often called a "broad view" of the case, which so frequently only means a view for which clear and definite legal reason cannot be produced. The first question was, "Were the circumstances of the contract to acquire the Concession La Victoria, that is to say the fact and terms of the sale by the Victory Gold Mining Company, to the City Stock Exchange Co., and of the re-sale by the last-named Company to the plaintiff Company, material matters to be disclosed in the prospectus of the plaintiff Company." It appears to me that this question, if it mean matters material to be disclosed to intending purchasers, could not be objected to. "Circumstances" are defined as meaning the *fact* and the terms of the sale. But as to the *fact* of sale, it is explicitly stated in the prospectus, and the terms, if it means the price, were placed within the reach of the shareholders. I suppose the learned Judge did not mean to question that the *fact* of the sale was disclosed, though the language used is perhaps unfortunate.

The second question, as to fraudulent intent, assumes that the particulars were not disclosed, and is based wholly upon that view.

The third question is whether the reference at the end of the prospectus to the contracts of February, 1890, was a reasonable means of bringing to the notice of persons reading the prospectus the circumstances mentioned in the above questions. I have great difficulty in understanding what that means. The Legislature says that that is the mode of giving information for one purpose,

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viz. in reference to promoters, directors, and officers of the Company, Why should it not be a reasonable mode of doing so as between the Company and the shareholders? What is the meaning of asking, Is it reasonable? It would be a far reaching and dangerous doctrine to establish that the non-disclosure of the price paid for an undertaking is evidence in every case of fraud, when the Legislature has in substance provided that giving the dates and names of the parties to the contract is a sufficient means of giving the information, though for another purpose.

The fourth question assumes that the third must be found in the negative. [His Lordship read the fourth question]. It would convey the information to anyone who chose to take it.

The fifth question is—"Was the defendant induced to apply for the allotment of shares by the prospectus"? Of course he was.

The sixth question is, in my opinion, irrelevant.

Then come the supplemental questions, viz.—"Was the statement that the mine had been proved rich in the prospectus true or false?" The answer was—"False." That answer is without any evidence to support it, and against the only evidence on the subject in the case.

The eighth question asked, "If false, was it false to the knowledge of the directors issuing the prospectus, or did they neglect to inform themselves before issuing the prospectus that same was false?" The answer was—"Yes." It does not appear which branch of the question that applies to. If not false, the question is inapplicable.

The ninth question was—"Was the Company formed with the *bona fide* intention of working the mine?" Intention upon whose part? Obviously of the promoters. "Or was it fraudulently promoted by persons connected with the Victoria Gold Mining Company for the purpose of recouping the losses of that Company and for the purpose of the private gains of the promoters of the plaintiff Company?" That is entirely as to the promoters, and the reference is to their action in getting up the Company and not to the Company itself.

The tenth question asked, "Did the defendant, by not paying calls, intend to repudiate the shares, and was such within a reasonable time after discovering the misrepresentation of the prospectus?" Answer—"Yes." It is simply ridiculous to say that not paying a debt is in itself a repudiation of liability. And question eleven, "If not, had the defendant reasonable time to repudiate his shares, after discovering the misrepresentation, and before action?" No answer.

It will be observed that there is no finding in any of these answers of any false or fraudulent statement in the prospectus. The only questions having any bearing on the allegation of fraud are confined either to fraud by the promoters or mere non-disclosure without more.

But even if there was fraud sufficient to uphold the verdict, the question of repudiation remains. The repudiation is pleaded in the defence in the way repudiation is always pleaded. "The defendant was induced to become the holder of the alleged shares by the fraud of the plaintiffs, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of the said shares or any of them, he repudiated and disclaimed the said shares and all liability in respect thereof." Then follow the particulars of the fraud. Mr. Ronan argued that this defence is all wrong, so wrong that it must be neglected, not on the ground the jury took, that repudiation of liability is proved by non-payment of a debt—that is absurd. Not on the ground the learned Judge was disposed to adopt, that the forfeiture of the shares rendered repudiation unnecessary or impossible: but on a totally different ground, namely, that no repudiation at all was necessary, and that the *onus* lay on the plaintiffs to prove an affirmance of the contract to take shares. On the pleadings there is no case to go to the jury. It seems to me that the question of repudiation must be decided on the facts as they stood before the forfeiture; for it would be too much to hold that after a notice that the shares were forfeited the shareholder ought to proceed and repudiate his position. Is repudiation necessary in the case of a contract such as the present, assuming it to have been procured by fraud? In my opinion it is. No one has ever suggested that such a contract is void; it is only voidable. A person induced to enter into a contract by fraud cannot hold on to it so as to derive a benefit, or a possible benefit, from it if it proves advantageous, and at the same time retain the right to dispute his liability to perform it. A contract to take shares differs widely from most ordinary contracts. It is, once the shares have been allotted, a partnership, and involves until repudiated—1, a benefit, actual or possible, to the shareholder; and, 2, a change of position or of rights on the part of the Company and its members. Although many of the cases quoted on this subject have occurred when the question was complicated by winding-up (when *restitutio in integrum* was impossible), the principle of such cases as *Lawrence's Case* (1), as to acquiescence, applies. I think the *onus* of proving repudiation within a reasonable time lies on the shareholder seeking to escape from his *prima facie* liability. *Clough* v. *London & North-Western Railway Co.* (2), and *Morrison* v. *The Universal Marine Insurance Co.* (3), were relied on. These were both peculiar cases. *Morrison's Case* (3) was a case in reference to a policy of marine insurance, and not a contract to take shares. It turned upon a question of misdirection; and the Court of Exchequer Chamber held that the charge of the learned Judge was unobjectionable. The findings in fact could not be disturbed, though the Court did not appear to think highly of them; they were not the subject of review. On the facts of the case, however, it made little difference in which way the question was put—that is, whether the defendant elected to affirm, or whether he elected to disaffirm the contract. The form of the plea does not appear. But in that case there was no question of change of position or the intervention of other rights such as may, and indeed one might almost say *must*, arise in a case of taking shares in a Company: see pp. 205-6. It was not a question of *status*, but simply a question of one particular contract being either good or bad.

On the other hand, in the case of *Bwlych-y-Plwm Lead Mining Company* v. *Baynes* (4), the form of pleading was the same as that adopted in this case; and there Bramwell, B., said:—"The plaintiff's case is founded on contract. There is no duty on the defendant except what he has undertaken; whether he is an original allottee, or whether he is a transferee who has been accepted by the plaintiffs as a shareholder, the case is the same.

(1) L. R. 2 Ch. App. 412.
(2) L. R. 7 Ex. 26.
(3) L. R. 8 Ex. 40, 197.
(4) L. R. 2 Ex. 324.

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If the defendant is liable, it is because he has undertaken to fulfil the duties of a shareholder in consideration of the plaintiffs giving to him the benefits of one. Now it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other person and has repudiated it on the discovery of the fraud."

In *Dawes* v. *Harness* (1) the question arose on a plea of fraud under the Judicature Act, without giving particulars or saying any more than that the defendant was induced to enter into the contract by the fraud of the plaintiff; yet it was held that even in that form the plea must be held to include an averment that the defendant had on discovering the fraud repudiated the contract. Lord Esher, in giving judgment, said :—"I am of opinion that this rule must be discharged. The declaration was upon a cheque drawn by the defendant, and to establish the defence it was necessary to show that the cheque was obtained by a fraudulent representation, and that the defendant, on discovering the fraud, disaffirmed the contract. If it were true to say that the fraud *per se* avoided the contract, the argument for the defendant would be good. But the true legal doctrine is that fraud merely renders the contract voidable, that is to say, gives an option to the party defrauded to disaffirm the contract; but until he disaffirms, it remains good. The plea of fraud taken as an allegation that the contract was procured by fraud and nothing more, would not amount to a defence, for it would be consistent with it that the contract still remained in existence." Grove, J., expressed his concurrence in almost identical language. And in *Central Railway Company of Venezuela* v. *Kisch* (2), Lord Romilly, in dealing with the question of laches, said (at p. 125) :—"In this case that question was minutely gone into by the Lord Chancellor, who showed, in my opinion, that the party is not debarred by any laches on his part from raising that question. But if a person takes shares in a Company and forbears to make any examination into it, and becomes bound by the Articles of Association, and continues his connection with it for a time, by which other persons may be induced, upon the credit of his name, to take shares in the Association,

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(1) L. R. 10 C. P. 166

(2) L. R. 2 H. L. 99.

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or to deal with it, then I apprehend that your Lordships will be of opinion that it is too late for him to get rid of his liability on the ground of his having been induced by false representations to take shares in the Company."

If, therefore, it were necessary for the decision of the case, I think that the question of disaffirmance ought to have been found for the plaintiffs. I gather from the report that, on the occasion of his visit to London, some two months before the forfeiture of the shares, the plaintiff learnt or heard something which induced him to believe that he had been defrauded, and that save on that occasion, he had heard nothing about the Company. I should be disposed to hold that the jury ought at least to have been asked whether, apart from non-payment of the call, the plaintiff had done anything to disaffirm the contract within a reasonable time. But I prefer to rest my judgment on the other grounds I have stated. I think the plaintiffs are entitled to judgment.

FitzGibbon, L.J.:—

I do not deny that, under other circumstances, there might, perhaps more properly than anything else, be a new trial of this case, but I regard this result as excluded by the course of the trial already had, and by the statement of the Solicitor-General to this Court, at the close of the first argument, that the plaintiffs did not in any event desire a new trial. Notwithstanding such a statement, a new trial might in some cases be necessary, but here the findings of the jury seem to me to cover, and even to go beyond, every inference of fact The questions which have been tried involve a consideration of the whole case, and all material evidence which exists has been either submitted to the jury or presented to us. I cannot quite forget, too, after all the litigation that has taken place, that a second trial would not be creditable to the administration of justice, in an action for £20 4*s*. 6*d*. We have the whole case before us now, we not only are in a position ourselves to draw any inferences of fact, but we have findings of the jury upon issues wider than those which we should have submitted, and we can both see the justice of the case, and foresee the result of another trial.

A new trial being out of the case, the only question is whether we can change the verdict, reverse the Exchequer, and enter judgment for the plaintiffs. To do this, we must hold that the plaintiffs were entitled to a direction at the close of the trial. In my view of the present position, the only ground stated in the conditional order which is now open is the general one —"that notwithstanding the findings of the jury on the general questions left to them, the Judge should have directed a verdict for the plaintiffs." In all the litigation in which this Company has been engaged, with the possible exception of the action in which Jagielski was plaintiff, I cannot find that any Judge before whom similar evidence has been given has thought that there was a case for direction, and I wholly fail to see how we can so hold. The course of the trial, as reported by the Judge, seems to me to leave the whole case open for decision without regard to pleadings, and to show that all the material facts were proved and considered. Larchin was examined as to the history of the mine, and as to the formation and fate of the several Companies which preceded the plaintiffs, including the City Stock Exchange Company. He prepared the prospectus with Gilbert's assistance. He stated expressly the cardinal fact on which my judgment rests when he said:—"There could be no money available for working purposes out of the first issue of 200,000 shares." Though he says that "there were other issues," he proves that only some 86,000 shares had been subscribed for at the date of the call; that the public did not at any time subscribe for more than 170,000 shares in all, and that the 400,000 other shares which were "disposed of" were issued to the City Stock Exchange Company. He was examined as to the concessions, the agreements of February 3 and 14, 1890, and the reports published in the prospectus. He proved that the only tender for a stamp-mill which was invited was one for £3000, and that the mill "was not got." Nicholls also was examined, and though he stated that a ten-stamp mill would be sufficient to commence working, he proved that a forty-stamp mill would cost over £20,000. Both Nicholls and Larchin described the mine, and proved what had been done and spent upon it. In short, every material subject of evidence was dealt with, nothing was rejected from consideration, and the plaintiffs have only themselves, or the facts, to blame if they are not

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entitled to judgment upon the whole case as presented at the trial.

After counsel on both sides had addressed the jury—no direction having been asked for up to that point—a discussion ensued as to the pleadings, and as to the questions to be left to the jury. In reply to the Solicitor-General the Judge stated that he was of opinion that the plaintiffs were entitled to a direction *upon most of the defences pleaded*; but no general direction for the plaintiffs appears to have been asked, or at least pressed for, even then, or at all. As to the defence of fraud, though the learned Judge stated that it seemed to him that, if there was any evidence of fraud, it was rather a fraud by concealment than by actual representation, the discussion as to the contracts, and the questions put to the jury, involved the consideration of all the circumstances of the case, the intent of the prospectus, and the truth, as well as the sufficiency, of the statements which it contained. In short, the trial in substance, even if not in strict form, covered everything necessary for a determination upon the ground of actual misrepresentation, as well as upon that of fraudulent concealment. Even if the findings 7 to 9 are rejected as they stand, they make it perfectly clear that if the jury had been asked whether the actual representations in the prospectus to which I shall refer, as to the purpose to which the money subscribed was to be applied, were false and fraudulent, they would have found in the affirmative.

The Judge reports that if there was any evidence to go to the jury, he is perfectly satisfied with the findings, and every fact and inference which I think necessary to sustain the verdict has, in my opinion, either been expressly found by the jury, or is implied in their express findings, or proved by Larchin and the prospectus.

As to form, the Judge reports that he stated that he would allow "any amendment of the pleadings necessary to support the questions," but to prevent expense and trouble "he would not require such amendments to be actually made," and that "the case should be dealt with as if they were made." He concludes hi report with these words:—"This seemed to be acquiesced in."

Upon this report, I hold myself bound to deal with the case a one in which only one question is now to be considered, namely whether, irrespective of pleadings, the plaintiffs are entitled t

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judgment, notwithstanding the findings of the jury, and I hold that we ought to follow Lord Blackburn's example in *Clough's Case* (1) and *Scarfe's Case* (2), and to see whether any defence can now be framed which would be supported by the evidence, and not inconsistent with the findings of the jury, and if so, to uphold the verdict.

The question of the plaintiffs' fraud has nothing to do with the question of the defendant's repudiation. Let us first see whether the contract to take the shares was induced by the plaintiffs' fraud, and then see whether the defendant is bound by his own conduct, in spite of the plaintiffs' fraud.

On the question of fraud, in an action by a Company, under such circumstances as we have here, I do not admit any distinction between such fraudulent concealment of material facts as took place here, and actual misrepresentation. The answer to Mr. Justice Wright's remark on *Muggeridge's Case* (3), viz. that its strict rule would be fatal to most prospectuses of the present day, is, with all respect—"So much the better." If a Company cannot float if the whole truth be disclosed by its prospectus, it cannot be honestly launched at all. Special considerations arise as to the effect of mentioning the contracts in the prospectus, but for the present I assume that nothing so material that the Company was bound to disclose it, except the contents of those contracts, has been fraudulently concealed. Though *uberrima fides*, *i.e.* the obligation to disclose everything known that could influence an intending subscriber, is not demanded of the authors of a prospectus, no case has, as yet, applied the rule *caveat emptor* to an invitation to the public to take shares. Lindley, L.J., in the passage quoted by the Lord Chancellor, treats prospectus cases as in an intermediate position between ordinary sales and dealings where *uberrima fides* is required. But I am satisfied that the very farthest limitation that has been even suggested upon the duty of disclosure which authors of prospectuses must discharge, leaves untouched the principle that they must not conceal anything which, if stated, would contradict, or even substantially alter, any material representation actually made by the prospectus, as an

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(1) L. R. 7 Exch. 34. (2) 7 App. Cas. 360. (3) 1 Dr. & Sm. 363.

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inducement to take shares. This prospectus, in my opinion, actually represents what was false to the knowledge of those who drew it, with respect to a vital matter, namely, the destination of the money subscribed. Every prospectus is a request for money to be invested with a prospect of profit, upon the faith of the statements which it contains, and every prospectus discloses the purpose to which the subscriptions which it invites are to be applied. If money is knowingly obtained upon a false pretence as to how it is to be spent, that is both a fraud and a crime. This prospectus states the capital to be £200,000, but it is limited to a "first issue of 200,000 shares" of 5*s.* each. No further call beyond 1*s.* per share, making £10,000, is to be made "this year." It is not dated. "This year" may mean any year, but it must at least include the calendar year in which the money is obtained. But let that pass. Whatever shares are allotted are part of an issue of £50,000 and no more, on which only £10,000 is to be called up within a year. What is to be done with the money? Paragraph 1 states that the Company will have (*a*) "the special advantage of taking possession of a property" which is (*b*) "*already* proved to be rich," and which (*c*) "requires only the erection of machinery to be *at once* in a position to make returns," and (*d*) tenders for this machinery are "*about to be* invited."

Paragraph 3 states that "It is proposed *in the first instance* to erect a forty-stamp mill." Therefore, the prospectus represents that a tender for a forty-stamp mill is "about to be invited," and when this mill is erected, "the special advantage" will immediately come into play which will put the Company "*at once*" in a position to make returns. This is an affirmative representation that the subscription of £50,000 capital and the payment of £10,000 is all that is required for the immediate starting of the mine: in other words, that a forty-stamp mill will be purchased and erected as soon as the money required to pay for it has been subscribed, and that the money subscribed will, so far as necessary, be spent, "in the first instance," upon the erection of the machinery necessary to make returns.

The second sentence of this Paragraph 3, by an easy arithmetical calculation, demonstrates that the "first issue" of £50,000, and not the whole capital of £200,000, is to be applied "in the first instance" to put the Company "at once" in a position to make the returns promised by Paragraph 1. The report of Walter Ness supplies the data:—The production of 3600 ounces, at 1½ ounces per ton, worth in all £14,000, involves working 2400 tons, at a cost of £3 5*s*. per ton, showing the expense of working to be £7800 out of £14,000, leaving the gross profit, after cost of crushing, only £6200 per month, or £74,400 per annum.

The prospectus states that "*the greater part of the profits* should, owing to the *working facilities*, be available for distribution *as dividends*, and that it is not unreasonable to anticipate the mine should readily *and speedily* pay dividends to the extent of one hundred per cent." A gross profit of £74,400 might provide a substantial amount to pay for the mine, and for the expenses other than cost of crushing, and leave enough to pay some such dividend on a paid-up capital of £50,000, but not on £200,000.

An anticipation of profits may be treated as only prophecy. But it is not as an exaggerated anticipation that I regard these passages as material. I read them as an express representation that a sufficient amount of the first issue of £50,000 is "at once" and "in the first instance" to be applied to the erection of whatever machinery is required to set the mine "speedily" to work.

For the answer to the observation of the Master of the Rolls that "at once" does not mean "in the first instance," in this prospectus, I refer to the prospectus itself.

This representation is a representation of fact, and Larchin, who drew the prospectus, expressly states that it is absolutely false. "There could be *no money available for working purposes* out of the first issue of 200,000 shares." The representation is beyond all doubt material. It is vital. It is made for the purpose of inducing subscribers to take shares, and it must have been acted upon as an inducement by the defendant, and by every one else who took shares, as he did, upon the faith of this prospectus, because it is the actual statement of the purpose to which the money is to be applied, and by the execution of which the dividends, however prophetical, are to be realized.

Starting from this basis, all the non-disclosures of previous dealings, of the successive failures of other Companies (one of which had spent £42,500 on the mine "already proved to be rich"), and of the partition of the Concession; the omission of dates from the reports; the uncertainty about where the samples came from: in fact all the other ugly circumstances about the prospectus, whether we regard them as *suppressiones veri* or as *suggestiones falsi*, are at least evidence of fraud, and we don't need to rely on them as anything more, when the prospectus starts with an actual misrepresentation upon the vital fact that none of the money applied for could be spent upon the mine.

At the same time, the loss of £42,500, which had been spent upon the mine, and the failure of the previous Companies, are strangely inconsistent with the statement that it had been "already proved to be rich." The proof of its "richness" is that it had beggared everybody who had undertaken the experiment. The statement and the concealed facts can be reconciled only by paltering in a double sense with the words "proved to be rich."

The reference to the contracts of February, 1890, is relied on as an answer to this, and Mr. Justice Chitty is quoted as if he had held that the plaintiffs became entitled to a direction, because the reference to the contracts complied in form with the statute, and that every subscriber thereby had imputed notice of the contents of those contracts. In other words, no one who subscribed, on the faith of the false and fraudulent representation that his money was to be spent on machinery, was cheated, because he had imputed knowledge that it was to go into the "open drains," which were in fact the pockets of Larchin and Gilbert, who drew the prospectus, and their colleagues. It may be that where the statute is complied with by giving dates and names, the subscriber has imputed notice of facts *consistent with the prospectus* which the contracts disclose; but I entirely deny that any reference to contracts, whether in the terms of the statute or not, can make any prospectus honest which is in fact fraudulent. Further, and *a fortiori*, if a prospectus contains any material representation of fact which is false and fraudulent, it cannot be the law that a reference in the statutory form to a document which would reveal the falsehood can place the framers of the prospectus in the same position as if they had not made the misrepresentation. It is no answer to a plea of false and fraudulent representation to say that the person who made it had supplied the

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person whom he defrauded with means by which he might have discovered the fraud before he acted upon it. Such a principle, as I once ventured to say in another case, would introduce the plea of contributory negligence as a defence to an action for deceit.

If it were necessary, I would discuss the question whether the doctrine of "imputed notice" has any application at all to an action of deceit, or to a defence of fraud, even where there has been nothing more than concealment; but I need not do so, because I find actual misrepresentation upon the face of this prospectus; and, as this case stands, it would be enough to say that there is evidence to sustain such a finding. Therefore, I hold the defence of fraud to be sustained, and I hold the defendant entitled to maintain his verdict, unless he has lost the right to rely upon the fraud through omission to repudiate the contract, or for some other reason.

Before going to that point, it is necessary to distinguish this case from the other more or less similar cases in which the same Company has been successful.

In *Kiernan's Case* (1) there was no evidence that he was in any way induced by the prospectus. On the contrary, he took the shares on Gilbert's personal recommendation and through his agency, without reading the prospectus, and, unfortunately, there was no inquiry, no evidence, and no finding, as to whether Gilbert was not acting for the Company in the transaction.

In *Broadhurst's Case* (2) Mr. Justice Wright treats the matter of fraud as a jury question, upon which he might find either way. He speaks of the prospectus as "not *sufficiently* misleading." He says there "was not *the sort* of want of candour, and *the sort* of misrepresentation *sufficient* to entitle the plaintiff to relief." He says:—"There was *no evidence sufficient* to enable him to say that the plaintiff in any way relied" upon the statements in the prospectus. This is no authority for directing a verdict for the plaintiffs. As to the judgment, I can only say that I prefer the findings of the jury upon the matters of fact, and I dissent from the observations which disparage Vice-Chancellor Kindersley's judgment in *Muggeridge's Case* (1), notwithstanding the approval of it in subsequent cases, and in the House of Lords. In my opinion, a Company inviting money on the faith of a prospectus is bound to state every known fact which, if disclosed, would prevent a prudent man from taking shares at all, and also every known fact which materially qualifies or alters the effect of the express representations made to induce persons to subscribe. It is to be observed that Wright, J., does not discuss the representations as to the money at all, and I don't agree in his charitable construction of the other statements in the prospectus. I have already stated my inability to find any authority whatever for applying *caveat emptor*—the rule that there is no obligation to disclose anything—to a case where a Company invites the public to purchase shares in a described undertaking, and makes statements to induce them to do so.

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(1) Unreported.

(2) Unreported.

In *Osborne's Case* (2) Mr. Justice Chitty expressly says that it is not necessary to decide what prospectus the plaintiff saw, or that he took shares on the faith of any. He says that the plaintiff was a man not likely to be misled, having been a Director of fifteen Companies—many of which may have been sham, most of which had been wound up, and none of which had ever paid a dividend. He expressly finds that Osborne was not misled, that his only inducement was the prospect of a Directorship, and that he was so intent on becoming a Director that he was careless and indifferent to other matters. It is only upon the question of costs that the learned Judge considers the history of the Company, or the evidence of fraud. He describes the transaction as "disgraceful to all concerned," and "between the *demerits*" of the Company and of the plaintiff, who desired to be a Director, he says, "there is not much to choose." He concludes: "My judgment has nothing to do with the action for calls." This may mean that if the Company sued for calls he would dismiss that action also, or it may refer only to the question of costs; but how the plaintiffs in this case, suing Twiss of Birdhill, an ignorant, inexperienced ex-shareholder, for calls, can rely on Mr. Justice Chitty's dismissal of the action for rescission brought by Osborne of London, a would-be Director, I cannot see.

(1) 1 Dr. & Sm. 381. (2) Unreported.

Of *Jagielski's Case* (1) we have only a newspaper report; but it is a strange coincidence that he is mentioned in the plaintiffs' letter of March 12th, 1891, along with Osborne, as being then about to be nominated as a Director. We have no materials for comparing his conduct or circumstances with those of Twiss.

The Scotch cases are in the same position; in fact, we know even less about them.

Therefore, both on the question of fraud, and on the question of repudiation, we must deal with this case upon its own merits, and upon our own responsibility, but with the ever-to-be-remembered points in view, that the defendant has got the verdict of a jury, and that we cannot order a new trial.

Upon the question of repudiation, I have already said that I hold myself bound to treat the pleadings as amended in any way consistent with the findings, and that can be supported by evidence. In favour of the plaintiffs, I admit that there is no evidence of repudiation before action brought. The plea can go no further than alleging fraud, absence of benefit up to forfeiture, forfeiture of the shares by the plaintiffs before action, and repudiation of the contract by the defendant after action, and by the plea. I think that such a plea is good, that there is no evidence of affirmance of the contract after knowledge of the fraud, and no evidence of such laches or acquiescence as would entitle the plaintiffs to a direction. Looking at the case as I hold myself bound to regard it, the only possible doubt that suggests itself to my mind as to the soundness of Mr. Justice Andrews' judgment, arises from the fact that my Lord Chancellor and the Master of the Rolls have come to an opposite conclusion. I might content myself by asking leave to adopt that judgment as it stands.

I think the character in which the defendant is sued is material. The forfeiture put an end to the *status* of shareholder, and also to all possibility of subsequent benefit from the contract. On the forfeiture, the defendant ceased to be a shareholder, and became a debtor merely. I admit that he remained liable as a debtor for the amount of the call, and that this liability arose under the original contract to take the shares. I therefore admit that this action is founded on the contract to become a shareholder; that that contract, being obtained by fraud, was voidable only and not void; and, therefore, that repudiation of the *status* of shareholder, and disclaimer of the subsequent liability, are necessary to the defence. The question resolves itself, in my opinion, into two parts—first, whether the defendant was too late to repudiate the shares after they were forfeited; and, secondly, not having repudiated the shares before the forfeiture, whether he is estopped from repudiating the liability *as a debtor* by plea, at the date and under the circumstances of the present case.

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(1) Unreported.

None of the cases cited appear to me to rule this case. The vital distinction between a defendant who is still a shareholder, and a debtor, appears in *Ayscough's Case* (1). The consideration of possible benefit disappears at the forfeiture. There is no winding-up here. No third party, no change of circumstances, intervenes. We have to deal with lapse of time and inaction only, and it is only by analogy that any of the cases cited can assist us to a conclusion. But it is, as Lord Hatherley says, "a question of more or less," and what are the facts? Having applied for shares and paid £2 10*s*. in September, 1890, the defendant heard nothing until in January, 1891, in answer to a letter of inquiry he was told that the shares had been allotted to him on October 24, 1890. A duplicate letter of allotment was then sent, and the second £2 10*s*., payable on allotment, was demanded. He, in reply, demanded back the first £2 10*s*., and said he did not now require any shares; but when he was informed that the allotment could not be cancelled, on January 27, 1891, he asked for another copy of the prospectus, saying that if the mine was a *bona fide* transaction he might take more shares. The prospectus was sent to him on January 30, with a curious request that it might be returned as the Company had no other copy, and on February 2, 1891, the defendant paid the second £2 10*s*. on the faith of the prospectus, which he sent back as requested, getting the receipt in due course. He certainly then contracted to take the shares; but, equally certainly, down to that, he knew nothing except what the prospectus told him, and he acted upon the faith of it. On March 5, 1891, he received the notice of call, which contains the curious statement that it is made "in response to demands," and "that all the shareholders might be placed on an equality." Then he made inquiries in London about the mine; he had not done so before. In consequence of the result of the inquiries, he "took no notice" of the call; this was the first transaction he had in shares of any kind, and he held no other communication with the Company, except that on March 10 he asked for the names of the Directors, and on March 12 he was informed that they were then Larchin and Pim only, but that Osborne, Gipps, and Jagielski, were about to be nominated. He took no notice of the preliminary demand and threat of forfeiture of April 27, nor of the notice of actual forfeiture of May 5, and he did nothing, and learned nothing more, until he was served with the writ on August 31, 1891. All this, in my opinion, affords no evidence of repudiation, but how does it supply any evidence of affirmance, or of election to hold the shares? Above all, what evidence is there of knowledge, either of the truth or of the fraud? It appears to me to be an unjustifiable amplification of the defendant's evidence to suggest that he learned anything whatever before action, which would have entitled him to disaffirm the contract, to sue for a rescission, or to recover back his £5. I do not see any evidence that he learned or knew any fact which ought to have put him on inquiry. His state of mind, as proved, amounted only to a determination to let things lie. As a juror, I should find, if it were necessary, notwithstanding the imputed knowledge of the Articles of Association, that he had no idea that he remained liable as a debtor for the full amount of the shares after forfeiture. From May 5 until service of the writ, I am satisfied that he believed the transaction to be at an end, his £5 gone, and his *status* of shareholder extinguished.

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(1) 6 E. & B. 761.

So far as the obligation to disclaim benefit is the basis of the obligation to repudiate the voidable contract, it disappeared on May 5; but of course his liability as a debtor remained in spite of his ignorance. But that is not enough, if he was still in time to repudiate the debt, and I can see no reason or authority coercing me to hold, in such circumstances as we have here—with, to quote Mr. Justice Chitty, such "demerits" on the side of the Company, and such

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ignorance and inexperience on the side of the defendant—that delay of two months precludes repudiation, or affords any evidenc of election to affirm a contract induced by fraud. I do not se any evidence that Twiss had knowledge of the fraud until afte action, nor, down to May 5, can I see that if he had then brough a suit in Equity to rescind the contract, or an action of deceit, h must have been dismissed. Again I point out that, if he *migh* have succeeded, or if it was not *a case for direction*, we canno enter judgment against him now.

The recent case in 9 *Times*' Reports is totally different, in th dates, in the conduct of the defendant, in the nature of the actio and in the absence of forfeiture. The shareholder there had deliberately watched and awaited the result of another man's sui before taking any steps to disaffirm his own contract.

From the forfeiture on May 5 to the commencement of th action, the liability of the defendant as between himself and th Company, and his obligation to disaffirm the contract, seem to m to be wholly changed. He was then a *debtor* and nothing more His abandoning his £5 to its fate, and doing nothing else, wa natural, and it certainly was no affirmance or election. It may b that if the rights of third parties or a winding-up had intervened he might have been held liable to the third parties, or to th liquidator on behalf of creditors. But I can find no case whic holds that, after the *status* of shareholder has been extinguished the debtor is bound to do anything, as against the Company whic issued the fraudulent prospectus and got his money, to disaffirm liability under the voidable contract, until he is sued upon it. N one was or could have been prejudiced by his inaction. He wa not even a past member who might be made a contributory; h was nothing but a *quondam* member, who had become a *debtor* and in my opinion Clough's case and Kisch's case apply to him Disclaimer against the fraudulent party is in time, so long as n act has been done affirming the contract, provided that no interes has vested in any innocent person, and that no statutory liabilit has arisen under the Winding-up Acts. In Lord Blackburn' words, "he may wait and think which way he will exercise hi election, so long as he can do so without injuring other persons" (1)

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(1) *Scarf* v. *Jardine*, 7 App. Cas. 360.

After the forfeiture he could no longer, as in *Morrison's Case* (1), "elect to treat the shares as subsisting," and his subsequent delay could not "import acquiescence" (*Erlanger's Case* (2)), for there was nothing in which to acquiesce except being a debtor for £20 4*s.* 2*d.*

To sum up. I fail to find any such knowledge, or ground of suspicion, or consciousness of liability, on the part of the defendant as put him under any obligation to do anything. Laches and acquiescence are only evidence of affirmance and of election; they are questions of "more or less," turning, as Lord Hatherley says, "on the mind of the tribunal." Considering all the circumstances, I cannot hold this defendant to have affirmed this contract, or elected to take or keep his shares, or done anything which could affect any third party, or recognised the liability sued upon, with knowledge, or even means of knowledge, that he had been defrauded, and I think his having done nothing cannot give the Company now any better right to treat him as a debtor than they had upon the day when they confiscated his £5 and forfeited his shares.

In my opinion, therefore, the verdict and judgment for the defendant should stand, and the appeal ought to be dismissed with costs.

BARRY, L.J. :—

We have had before us two cases, in each of which the Aaron's Reefs Co. have sued for a call of 4*s.* In one of these actions a Dr. Kiernan was the defendant, in the other (that now before us) a Mr. Twiss is the defendant, and I am bound to say that during my experience in the Queen's Bench and this Court no motion for judgment, or for a new trial, has ever been presented under circumstances so unsatisfactory, a state of things, we must presume, to be attributed to the failure or inability of the defendants to obtain the information necessary for putting their defences forward in an effective manner. Twiss's case was first tried, and resulted in the verdict for the defendant, now under our consideration. The case of Kiernan then came on for trial before the

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(1) L. R. 8 Ex. 48.

(2) 3 App. Cas. 1231.

same Judge, and his Lordship has reported that it was agreed b
the counsel on both sides (being the same in both cases) th
Kiernan's case should be tried by the same jury; that the eviden
given in Twiss's case on behalf of the plaintiffs, both on dire
and cross-examination of their witnesses, should be taken
having been given in Kiernan's case; that the defendant Kierna
was to be examined as to the circumstances under which he w
allotted the shares, and as to his correspondence with the plai
tiffs; and in so far as this evidence could not affect the issues alread
found by the jury, it was to be assumed that there were simil
findings in Kiernan's action. The absence of any practical adva
tage in this arrangement (beyond dispensing with some or
examination of witnesses) towards facilitating the determinatio
of the case is obvious from the fact that the cases of the tw
defendants were radically different. Kiernan admitted in h
evidence that he never read the prospectus, and was not induce
by it to take the shares, so that nine out of the ten jury question
upon which we have had, in this case, so much argument an
re-argument, were entirely inapplicable to Kiernan's case. Th
Judge directed a verdict for the plaintiffs in that case. The de
fendant applied to the Queen's Bench Division to enter the verdi
for him, or order a new trial. That Court granted an order for
new trial. The plaintiffs then appealed to this Court. Th
defendant Kiernan contended here that although he did not rea
the prospectus, yet it was sent to him by Gilbert in a lette
which was in itself a false and fraudulent inducement to tak
shares. But in the way of this contention stood several question
for example, were the statements in the circular of such a characte
as to amount in law to fraudulent misrepresentation? Was Gilber
in writing that letter, acting as the agent authorized in that beha
of the Company? Was Kiernan induced by that letter to take th
shares? This last question was answered in the negative b
Kiernan himself in his evidence. His counsel then argued tha
there was proved a vague fraud expressed in the words that th
plaintiffs were what was termed a "Bogus Company," and t
support that contention the counsel relied on the answer of th
jury in Twiss's case to the 9th question; but on looking at th
finding, it is a finding of fraud in the promoters of the Company

and not in the Company as incorporated. This Court reversed the decision of the Queen's Bench Division, and affirmed the direction of the verdict for the plaintiffs by the learned Judge. For myself individually, I may say that the strong inclination of my opinion, as I then stated, was to affirm the Queen's Bench Division, and grant a new trial, as being the course most in furtherance of justice; but the reasons against my view were (perhaps rather technically) so strong that I did not press it to the length of a dissent from my learned colleagues. I have deemed it expedient to go so far into Kiernan's case, because having regard to what has happened in this case with regard to a somewhat unusual reliance by the plaintiffs on unreported cases of this Company in Courts in England, where the shareholders raised the question of fraud in this prospectus, Kiernan's case may be relied on as a decision in favour of the Company inconsistent with my view in this case.

We now have to deal with Twiss's case, with which Kiernan's case was so strangely interlaced. Two propositions have been argued before us—1, Was there evidence to go to the jury that the prospectus was fraudulent? 2, Was there a sufficient repudiation by the defendant to support his defence of fraud? I pass by for the present the form of the pleadings and of the findings of the jury. On the first question it is not necessary for me to decide whether if I were (as a Judge in equity is) a Judge on the question of fact, I would hold the prospectus fraudulent, I have only to decide whether there is evidence on which a jury of reasonable men might find it to be fraudulent. That there was such evidence I entertain no doubt. Concurring, as I do, in the able judgments of Mr. Justice Andrews in the Exchequer Division, and of my brother Fitz Gibbon here to-day, and substantially for reasons which they have assigned, I do not think it necessary or reasonable to go into detail, or do more than in a broad and general way give my reasons for my concurrence in their conclusion.

The obligation and responsibility of persons issuing a prospectus to the public are thus described by that most accurate lawyer, Vice-Chancellor Kindersley, in *The New Brunswick and Canada Railway Company* v. *Muggeridge* (1), "those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality, of the privileges and advantages which the prospectus holds out as inducement to take shares." That passage, fraught as it is with common sense and morality, and therefore with sound law, is cited with approval by the Lord Chancellor (Lord Chelmsford) in *The Directors, &c., of Central Railway Company of Venezuela* v. *Kisch* (1), where his Lordship, at p. 113, says:—"But although in its introduction to the public some high colouring and even exaggeration in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, yet, no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements." These judicial enunciations are sound in law, in common sense, and in morals. Now, there have been produced to us on behalf of the plaintiffs, and as decisions in their favour, two manuscript reports, one of a judgment of Mr. Justice Chitty, and the other of a judgment of Mr. Justice Wright, in cases where shareholders sought to be relieved from liability on shares in this Company, on the ground of fraud in this same prospectus.

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(1) 1 Dr. & Sm. 381.

In one of these cases (*Aaron's Reefs Company* v. *Broadhurst* (2))

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(1) L. R. 2 H. L. 99.

(2) Unreported.

Mr. Justice Wright, referring to the rule laid down (as I have cited) by Vice-Chancellor Kindersley in *Muggeridge's Case* (1) is reported to have said:—"As respects the principle laid down in the case of *The New Brunswick Railway Company* v. *Muggeridge* (1), if that principle is to be taken strictly according to the language of the rule laid down there, I think that there are very few prospectuses that could possibly be held to be sufficiently candid." To that, with all respect to the learned Judge, I answer, if it be, as he says, so much the better for the sake of commercial morality, and in the interest and for the protection of the innocent members of the public—assuming, of course, that the rule is administered with common sense and due allowance for the high colouring and exaggeration which must be expected in a vendor's advertisement. The learned and able Judge in the same report is represented as giving his opinion of this particular prospectus thus:—"I do not, and I cannot, consider the prospectus a candid one, but the evidence given by the plaintiff has, to my mind, failed to establish that the prospectus is *sufficiently misleading* to entitle him to relief." We have not any report of the evidence given before the learned Judge, nor as to how the plaintiffs' case was presented in argument before him, but taken in the abstract the principle involved in the last passage I have read from his judgment is strongly suggestive to one's mind of the Shakesperian knight's description of his reason, "I have no exquisite reason for't, but have reason good enough"; so it seems we may have not an honest prospectus, but a prospectus honest enough With all respect for Mr. Justice Wright, I must prefer the rule of sense, morality, and law, laid down by Vice-Chancellor Kindersley and Lord Chelmsford to any conceivable practical system of gradation in fraud. On the first question, viz. the existence of fraud in the prospectus, I cannot help saying, though at the risk of being thought (and perhaps deservedly) presumptuous, that I think there is found pervading many of the cases or *dicta* a forgetfulness of, or at least a tendency to minimise the effect of, what I deem to be a fundamental principle of law and morals, namely, that no man should be permitted to take advantage of his own fraud, *Nemo*

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(1) 1 Dr. & Sm. 381.

ex proprio dolo consequitur actionem. There is also, as it seems to me, some element of confusion in considering these cases of fraud arising from the fact that there is a concurrent jurisdiction at law and in equity. At law the function of the Judge is to instruct the jury as to the law; but it is for the jury, under his instructions in law to draw the inferences of fact, while in equity the Judge is judge of law and fact, and his decision *in fact* is often afterwards dealt with as a decision *in law:* see per Lord Blackburn in *Smith* v. *Chadwick* (1). It is argued in this case that to sustain this defence of fraud it is necessary to establish that there is evidence of the existence in the prospectus of an *affirmative or active* misstatement of fact. Assuming, but by no means admitting that there is such necessity, I am of opinion, that there is cogent evidence of such misstatement in the prospectus.

After the exhaustive, and, to my mind, conclusive discussion by my brother FitzGibbon of this branch of the case, I could not think of going into any detail. I am of opinion that the prospectus contains unequivocal statements which are material, and to the knowledge of the plaintiffs untrue. The first issue is announced by it to be 200,000 shares, of which only £10,000 is to be called up within a year. The first paragraph of the prospectus states:—"This Company has entered into a contract to acquire the Concession La Victoria forming part of the well-known mining property of the Victory Gold Mining Company in Venezuela, and will have the special advantage of taking possession of a property which already proved to be rich requires only the erection of machinery (tenders for which are about to be invited) to be at once in a position to make returns."

The second paragraph is: "It is proposed, in the first instance, to erect a forty-stamp mill, and make additions from time to time, as the increased output may render it necessary. An average yield of only 1½ ounces per ton would give a return of 3600 ounces per month, value nearly £14,000, the greater part of which should, owing to the working facilities, be available for distribution as dividends, and (it is not unreasonable to anticipate) the mine should readily and speedily pay dividends to the extent o 100 per cent.

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(1) 9 App. Cas. 189.

We have heard from the Master of the Rolls a most elaborate and, I need not say, able analysis of the prospectus, and the facts connected with it, to show that it is capable of being regarded as truthful and guileless. That may be so, and would be probably conclusive in favour of the plaintiffs if their prospectus was only intended to be circulated amongst, and to operate upon, persons of such experience and trained intellect as is my learned colleague; but we all know it is not for such persons that these documents are concocted; it is not among such persons that they are circulated, or upon such persons that they are intended to operate; these prospectuses are circulated throughout the land amongst persons of every class and degree, who may have money wherewith to speculate, and may desire to increase a straitened income by large interest on their small capital. I think an English judge is reported, somewhere, as having expressed himself to the effect, that the rules of law are not intended for the protection of fools or imbeciles. If this proposition were expressed, and intended to apply to cases of fraud, I entirely dissent from it. I cannot believe it to be the law of this country, that a man knowing that a person, or class of persons, are inexperienced, ignorant, or weak-minded can, in a contract fraudulently take advantage of such inexperience, ignorance, or weak-mindedness, and when the person so deceived seeks a remedy at law, the deceiver can successfully answer him by saying, that if the victim was not such a fool he would not have been captured by the fraud. But in this case there is no question of deceiving fools or imbeciles. I am of opinion that if any man of education and average, or more than average, intelligence but inexperienced in such speculations and documents, were to read that prospectus, he would understand it as stating and affirming distinctly as matter of fact, that the property "already proved to be rich," of which the Company is to have the special advantage of taking possession, "required only the erection of machinery to be *at once* in a position to make returns," and that tenders for that machinery were "about to be invited," that it was "proposed, *in the first instance*, to erect a forty-stamp mill," thereby conveying to the reader that a tender for such forty-stamp mill was "about to be invited," and that when that mill was erected the property would be "*at once* in a position to make returns"; and above all, would not such a reader of this prospectus understand that the subscriptions of £50,000 capital, and the payment of £10,000 of that sum, would enable the Company to start the mine, and *would be so applied*, whereas there was ample evidence to justify the jury in finding, if not to coerce them to find, that the subscription of the £50,000, and payment of the £10,000, would not enable the Company to start the mine, or put it *at once* in a position to make returns, that it was not "proposed" (which must mean "intended"), in the first instance, to erect a forty-stamp mill, and whereas not a shilling of the £50,000 (unless, perhaps, £3000 for a stamp-mill) was to be applied to the erection of machienry or other working purposes, but all was to go into, what Mr. Justice Chitty, in his judgment in *Osborne's Case* (1), felicitously designated the "open drains," namely, the pockets or coffers of Larchin and Gilbert and their colleagues, and the two Companies to be paid under the contracts of February, 1890.

There has been some reference made to the meaning of the words "at once" and "in the first instance." I think any ordinary reader would understand them in the sense which, I think, was intended by the composers and issuers of the prospectus, namely, as conveying that the subscription of £50,000 was to be applied *immediately* to start the mine in working. The falsehood of the prospectus in the particulars I have referred to is sufficiently established for a jury by the evidence of Larchin who drew up the document, but when it is read in connection with the contracts of February, 1890, it seems to me to be impossible to argue that there is not sufficient evidence that there is affirmative misstatement in the prospectus. As I shall have to refer on the point of fraudulent concealment to the mode in which the plaintiffs have dealt in argument with these contracts and the effect of the reference to them in the prospectus, I shall pass them for the present. The existence of affirmative misstatement has (as I have said) been discussed so fully by Lord Justice FitzGibbon that I do not go further into detail on that point; but I think Mr. Justice Chitty has, in his judgment in *Osborne* v. *Aaron's Reefs Co.* (1),

(1) Unreported.

given a graphic account of the origin and history of the plaintiffs in this case, which is most deserving of consideration. The judgment is not reported, but has been pressed upon our attention by the plaintiffs in the form of what is stated by their counsel to be a shorthand report of the learned Judge's language. The action was brought by the plaintiff Osborne to have his name removed from the list of shareholders, on the grounds of fraud in the prospectus now under our consideration, and Mr. Justice Chitty dismissed the action, on the ground, as I understand from my perusal of the shorthand report, that the plaintiff was not deceived by anything in the prospectus; but, with full knowledge of the nature and position of the Company, had sought to be made a director. The following is extracted from the learned Judge's judgment. After referring to the Companies antecedent to or connected with the Company here (plaintiffs) the learned Judge is reported to have said:—"The plaintiff was a shareholder in the third Company. The Gilbert gang, as it is called, was concerned with all the four Companies. Shirshaw Powell Gilbert and Robert Larchin were two members of this set of persons. Having registered the Aaron's Reefs on the 15th January, 1890, Gilbert and his associates proceeded to register on the 24th of the same month another Company, which they called the City Stock Exchange Company, Limited. This Company was wound-up in November, 1890. It was obviously brought into existence merely for the purpose of the two contracts mentioned in the Aaron's Reefs prospectus, and dated the 3rd and 14th February, 1890. The audacity of the promoters in mentioning these contracts in the prospectus is perhaps not singular. The plaintiff, no mean authority on the subject, said in his evidence he had never asked to see the contracts mentioned in the prospectus. Bold promoters seem to rely upon the public not asking for them, and to know the law that those who take shares on the faith of a prospectus which refers them to the contracts cannot complain on the ground of ignorance of what is to be found in them. If anyone had inspected these two contracts he would at once have become aware of the following startling facts. By the contract of the 3rd February the Victory Gold Mining Company purported to sell part of their Venezuela Concession to the City Stock Exchange

Company for £25,000. Of this sum £6000 only was paid or payable by the latter Company. The balance of £19,000 was to be paid by the Aaron's Reefs Company out of one-half of the moneys received from the public for subscription for shares in that Company, which was to be set apart and paid to the Victory Company, with which the whole of the £19,000 was thus discharged. By a contract of the 14th February the City Company sold the same part of the Concession to the Aaron's Reefs Company for a sum which fixed it at £150,000, being six times the price payable by the City Company and twenty-five times the amount payable by the City Company to the Victory, and the Aaron's Reefs Company, whose subscribed capital then amounted to 35*s*., was bound to set apart and pay out of the moneys received from the public for subscriptions for shares £38,000, one-half to go to the Victory and the other half to go to the City Company. This left £112,000 payable by the Aaron's Reefs Company to the City Company, to meet which the Aaron's Reefs was bound to set apart and pay two-thirds of any further moneys received from the public for subscriptions for shares. The other third was generously left to be applied by the Aaron's Reefs (as the contract phrases it), 'for working expenses,' that is, for developing and working an undevoloped mining property in Venezuela. The cost of a forty-stamp mill to buy and set up would not be less than from £25,000 to £30,000. It was in this state of things that the Aaron's Reefs prospectus was put before the public, offering only 200,000 shares which, if all taken up, would if and when fully paid, have produced only £50,000, which, according to the term in the prospectus, could only have produced £10,000 in the year 1890, the whole of which was to pass away at once by the two open-mouth drains constructed by the contracts, in equal parts, direct into the pockets of the Victory and the City Company, or the persons who really represented those two Companies. The £11,000 or £12,000, the total sum actually received by the Aaron Reefs from the public for subscriptions were, in fact, paid away to the Companies, with the exception of some sums retained by the Aaron Reefs for preliminary and other expenses. Comment is useless. Such a scheme was disgraceful to all concerned in it. Of course the contracts have since undergone the usual modification under which the vendors, having obtained the cash subscribed by the public, take the Company's shares. I decline to give any costs in this action to such a Company."

As the judgment of Mr. Justice Chitty has not been published in any legal report, and as there was only one copy in manuscript produced by the plaintiffs here on the hearing, I have deemed it right to quote these extracts.

I shall now very briefly refer to the question of fraudulent concealment. I am of opinion that on a defence of fraud such as is raised here there is no practical distinction between fraud by false statement and fraud by concealment. The reverse is established by the cases already cited: *New Brunswick and Canada Railway Company* v. *Muggeridge* (1); *Central Railway Company of Venezuela* v. *Kisch* (2).

It cannot be disputed that the contracts of February were matters most material to be fully and explicitly disclosed to the public invited to take shares. How do the plaintiffs answer this? They say, first, they have complied with the statute of 1867, and that therefore there can be no fraud in their not having made any further disclosure of the contents of these contracts. I am of opinion that such cannot be the effect of the statute. It creates a distinct statutory fraud if its provisions be not complied with, but it does not provide that if its prescribed mode of disclosure be complied with, such mode will not, if otherwise wilfully intended and calculated to withhold and hide the truth, be a fraudulent concealment. To hold otherwise would be to constitute the statute an apt instrument of fraud. But then, the plaintiffs say, secondly, that independently of the statute there is the doctrine of law, that notice of a document is notice of its contents. I am of opinion that this doctrine does not apply to a case like the present at all, especially where the very mode of giving the supposed notice, which in cases of conveyancing or the like, would, if honest, be sufficient, is part of the very fraud complained of. Apply this doctrine of notice to the facts of the present case. The defendant and a friend are at a remote place on the West Coast of Ireland. The friend shows him the prospectus. The defendant never before had any transaction in shares, nor, so far as appears, had

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(1) 1 Dr. & Sm. 181.

(2) L. R. 2 H. L. 99.

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his friend. The friend says, "That it looked like a good thing to take shares in." On this the defendant applies.

Now, can it be the rule of any civilized system of jurisprudence, where justice and common sense are intended to prevail, that this man is to be presumed to be acquainted with this doctrine of notice, and to know that if these contracts disclose that the prospectus which he reads is a tissue of falsehoods, and show a state of facts in which no sane man in his position would become a shareholder, he is bound by their contents, as if he had read them, and with full knowledge of their contents and consequences had deliberately purchased the shares? I cannot believe that such is our law. There is a passage in Mr. Justice Chitty's judgment in *Osborne's Case* (1), indicating an opinion that the reference to the contracts in the prospectus does affect a purchaser of shares with notice of the contents of the contracts, but in that case the passage I refer to was only an *obiter dictum* of the learned judge, for whose opinion I entertain the most profound respect, but if that *dictum* was meant to apply to a case like the present, I must, with all deference, dissent from it. Again, can it be seriously suggested that it was intended or expected by the Company, in issuing their prospectus, that a man, such as the defendant, in a remote part of the kingdom, would employ some lawyer or other person experienced in such transactions, to inspect these contracts and advise him on them and their effect? Of course not. In my opinion one of the strongest pieces of evidence of fraud in the case was the adoption merely of the statutable reference to the contracts in the well-founded conviction that few, if any intended victims residing at a distance, would ever think of inspecting or inquiring into the contents of the documents. The prospectus does not even state when or where the contracts could be inspected, a statement which if made might, perhaps, suggest to the reader the prudence of such an inspection.

The plaintiffs use this doctrine of notice in two ways. They contend first, that any misstatement in the prospectus which *per se* might amount to, or be evidence of, fraud, is explained and rendered innocuous by the contents of the contracts of which the

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(1) Unreported.

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defendant had this imputed notice, and that there is no fraud, as the prospectus and the contracts read together disclose the whole truth, and that if the defendant were misled, it was his own fault in not having inspected the contracts. I do not think that such can be the law. I deny that any one who has wilfully put forward a fraudulent document ought to be allowed to defend himself by saying that he had afforded the person defrauded the means of discovering the fraud before he acted upon it. See *Reynell* v. *Sprye* (1), *per* Cranworth, L. J.; *The Directors, &c., of Central Railway of Venezuela* v. *Kisch* (2); *per* Lord Chelmsford. I am, therefore, of opinion that there is evidence in the case to sustain a verdict that the prospectus was fraudulent in wilful misstatements, and in fraudulent concealment.

I shall now very briefly refer to the remaining point, namely, whether there has been a sufficient repudiation by the defendant to enable him to rely on the defence of fraud. This part of the case has been fully discussed by Mr. Justice Andrews in the Court below, and by Lord Justice FitzGibbon here, and it is unnecessary for me to do more than express my concurrence in their conclusion.

I think this case is governed by the principles to be found in *Clough* v. *The London and North-Western Railway Co.* (3). That case arose out of a fraudulent sale of goods, and the Court of Exchequer Chamber laid down the position in such cases of the defrauded vendee. Mr. Justice Mellor, at page 35, in delivering the judgment of the Court, says:—"In such cases the question is, has the person on whom the fraud was practised, having notice of it, elected not to avoid the contract, or to avoid it, or has he made no election? We think that so long as he made no election he retains the right to determine it either way, subject to this that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. . . . Neither can we see the principle or discover the authority for saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea." The application of the law, as laid down in that case, to contracts to take shares in a Company like that of the plaintiffs is subject to some qualification. The right of the person defrauded to avoid the contract is ended by the supervention of proceedings under a winding-up petition: *Oakes* v. *Turquand* (1). Perhaps also, having regard to the possibility of many innocent persons being induced to take shares on the faith of names on a register, a Court may, under circumstances, require greater promptitude in repudiation on the part of the defrauded person than in an ordinary case of contract between individuals. But to hold (as has been suggested) that the law laid down in *Clough's Case* (2) does not at all apply to contracts to take shares, would be in effect to decide that once a man has been induced by fraud, no matter how gross on the part of a Company, or those for whom it is responsible to become its shareholder, he has no means in law to defend himself against that Company seeking to enforce that contract so imposed on him by their own fraud. For such a proposition no authority has been, nor, I believe, could be, cited, and it is inconsistent with a host of cases, some of which will be found referred to in Moncrieff on Fraud, p. 414, n (f). The question, then, is—1, was there a sufficient repudiation; and, 2, within a reasonable time? This part of the case has been so fully discussed by Mr. Justice Andrews in the Court below, and in the, to my mind, convincing judgment of Lord Justice Fitz Gibbon here, that I deem it a bootless waste of time to repeat their reasoning, or do more than express my concurrence in their conclusion that there was evidence of a sufficient repudiation within a reasonable time, even assuming that repudiation not to have been complete until plea pleaded; that there was no evidence of any act of affirmance of the contract after knowledge of the fraud, and no evidence of such laches as ought to be regarded as such evidence. The necessity of restoration of the property or relinquishment of any benefit under the contract was obviated by the forfeiture of the shares. Under ordinary circumstances I think that, having regard to the pleadings and the frame of some of the questions put to the jury at the request of defendant, and the omission of other questions, the more strictly accurate course for us to take would be to direct a new trial. But the Solicitor-General, as I understood, at the close of the first argument, stated, and, I think, wisely, that the plaintiffs did not wish a new trial, which I interpreted to mean that they desired a decision from us on the question whether the verdict and judgment for the defendant should stand, or judgment should be entered for the plaintiffs. Further, the case was, as I understand, argued before us on the assumption that the result of Mr. Justice Holmes' reservation was that if on the pleadings, as they stand, a defence of fraud valid in form is raised, or if on any amendment thereof a defence of fraud could be framed which, as on the original pleading, or as on such amendment, would, in the opinion of the Court, be sustained by the evidence, having regard also to the findings of the jury, the verdict should stand. The whole case is open before us, and has been so argued. We have on the report of the learned Judge and the various documents all the materials to enable us to arrive at a decision between the parties, including in these materials the findings of the jury which, though not legally apt, yet inferentially show what were the opinions of the jury on every material issue involved. On the whole, I am of opinion that the judgment of the Exchequer Division should be affirmed. Of course I am not without doubt as to the form of the order, having regard to the state of the record, and as to the general result by reason of a different conclusion being arrived at by the Lord Chancellor and the Master of the Rolls.

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(1) 1 DeG. M. & G. 660. (2) L. R. 2 H. L. 99. (3) L. R. 7 Ex. 26.

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(1) L. R. 2 H. L. 325.

(2) L. R. 7 Ex. 26.

Solicitor for the plaintiffs: *C. R. M'Namara.*
Solicitor for the defendant: *E. White.*

R. D. M.

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Appeal.
1893.
Nov. 30.
1894.
Jan. 30.

CLARKE *v.* THE MIDLAND GREAT WESTERN RAILWAY CO. (1).

Trespass to land—Former action for the same act of trespass—Continuing damage—**Nemo bis vexari debet pro eadem causa.**

In 1887 the defendants entered upon the bed of a stream, which flowed between the lands of the plaintiff and of an adjoining owner, forming the boundary between them, and they dug holes in, and deepened the bed of, the stream, for the purpose of improving the water supply at their station at A. The plaintiff averred that in consequence of the acts of the defendants the water in the stream flowed past his land more rapidly and at a less depth, so that the plaintiff's lands were liable to trespass of cattle. The plaintiff had brought an action against the defendants for trespass, which resulted, on the 24th March, 1892, in a verdict for damages for £40, on which judgment was entered. No further acts of trespass had since been committed by the defendants. The present action was brought on the 15th November, 1892, for a continuing lowering of the stream and interference with its natural flow. At the trial the jury found for the plaintiff, with £15 damages, and leave was reserved to either party to apply for judgment:—

Held, in the Queen's Bench Division, by O'Brien and Gibson, JJ. (*diss.* Harrison and Holmes, JJ.), and by the Court of Appeal, that the plaintiff was entitled to judgment.

This was an action for trespass by the defendants to certain lands of the plaintiff, being part of the bed and channel of the Kilcornan River. This stream flowed between the lands of the plaintiff and Lord Perth, forming the plaintiff's boundary, and in 1887, the defendants, for the purpose of improving the water supply at their station at Athenry, dug holes in and deepened the bed and channel of the river, whereby the water flowed more rapidly, and at a less depth, past the plaintiff's lands, so that the plaintiff's lands were liable to trespass of cattle.

The defendants pleaded, besides other defences, a judgment recovered in a former action by the same plaintiff, on the 24th

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(1) In the Queen's Bench Division, before Harrison, O'Brien, Holmes, and Gibson, JJ.

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March, 1892, for the same cause of action, for the sum of £40. No further trespass had been since committed by the defendants, but the plaintiff claimed that the acts done in 1887 had the effect of a continuing lowering of the stream, and interfered with the natural flow thereof.

The present action was brought on the 15th November, 1892, and was tried before the Lord Chief Justice, at the Spring Assizes at Galway in 1893, resulting in a verdict for the plaintiff for £15, and leave was reserved to either party to apply for judgment.

The plaintiff moved to have judgment entered for him.

Roche, *Q.C.*, *Stritch*, and *G. Fetherstonhaugh*, for the plaintiff:—

Where the continuance of a wrongful act causes damage, the continuance is a new cause of action: *Whitehouse* v. *Fellowes* (1); *Devery* v. *Grand Canal Co.* (2). The acts complained of amount to an interference with a right, and consequently the plaintiff may bring an action for the continuance of the interference: *Thompson* v. *Gibson* (3); *Shadwell* v. *Hutchinson* (4); *Darley Main Colliery Co.* v. *Mitchell* (5); *Crumbie* v. *Wallsend Local Board* (6). The damage was a continuance so as to accrue from day to day: Pollock on Torts, pp. 344, 364; Addison on Torts, pp. 32, 56. The Company are not relieved from liability because they cannot go in upon the lands to abate the nuisance; *Thompson* v. *Gibson* (3); *Wilson* v. *Peto* (7): *Rosewell* v. *Prior* (8).

Nolan, *Q.C.*, *Meredith*, *Q.C.*, and *Butler*, for the defendants:—

If the plaintiff's contention is right he may go on for ever bringing actions with respect to a cause of action for which we have already paid damages. The maxim, *Nemo bis vexari debet pro eadem causa* is, we submit, a good defence: *Clegg* v. *Dearden* (9); *Thompson* v. *Gibson* (3); *Rosewell* v. *Prior* (8), and *Darley Main Colliery Co.* v. *Mitchell* (5). These were all cases in which trespass was the cause of action. Assuming this to be a nuisance, we cannot

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(1) 10 C. B. (N. S.) 765.
(2) Ir. R. 9 C. L. 194.
(3) 7 M. & W. 456.
(4) 2 B. & Ad. 97.
(5) 11 App. Cas. 127.
(6) [1891] 1 Q. B. 503.
(7) 6 Moore, 47.
(8) 12 Mod. 635.
(9) 12 Q. B. 576.

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enter on the plaintiff's lands to abate without committing a fresh trespass.

Cur. adv. vult.

GIBSON, J. :—

In the dry season of 1887 the defendants, for the purpose of improving the water supply of their station, made certain alterations in the bed of a watercourse furnishing such water supply. The stream lay between the estates of Lord Perth and the plaintiff. The defendants' operations were wrongful *ab initio* and actionable, and have resulted (as found by the verdict), in continuing injury to the plaintiff's right to the flow of water. It would seem from the statement of the defendants' counsel, and the probability of the case, that the defendants still enjoy the benefit of the alteration made by them in the channel, so that the advantage to the defendants and the injury to the plaintiff are alike continuous.

The question of law presented for decision is whether the defendants, against whom damages have been recovered in a previous action for their unlawful alteration of the *alveus*, are responsible for the continuance of the injury and nuisance to the plaintiff's right resulting from work completed in 1887, which they have no legal authority to alter or remedy.

The general principle of law is, *nemo debet bis vexari pro eadem causa*. For an act directly wrongful in itself, and in itself constituting a cause of action, damages can only be sued for and recovered once for all. But the principle manifestly does not apply where there is a new growing cause of action. Thus where damage is the cause of action, as in *Darley Main Colliery* v. *Mitchell* (1), action for past damage cannot affect the right to be compensated for subsequent damage constituting a new cause of action. So, in the case of nuisance to light: *Shadwell* v. *Hutchinson* (2); or to water rights: *Devery* v. *Grand Canal Co.* (3); or to a market: *Thompson* v. *Gibson* (4): the continuance of the injury is a new or springing cause of action. In cases of this character the right to recover damages for the continued invasion of right is necessary to protect the plaintiff's title against prescription on the part of the wrongdoer.

(1) 11 App. Cas. 127.
(2) 2 B. & Ad. 97.
(3) Ir. Rep. 9 C. L. 194.
(4) 7 M. & W. 456.

Two arguments have been chiefly urged on behalf of the defendants: First, that even if there was a continuance of the injury, there was no continuance for which the defendants could be responsible, as they had no control over the channel, and could not (even if they would) restore it to its original state; secondly, that the alteration of the channel was an act done once for all, and final and complete in itself, and could not be treated as a continuing injury any more than the felling of a tree or the excavation of a pit in *alieno solo*.

First, as to the first point. In the case of trespass, as distinct from nuisance, where the act is one of destruction, such as knocking down a wall, or making an excavation, the damage must be assessed once for all, and there is no continuing cause of action. Where the trespass consists in the imposition of something upon the premises of another, so long as the trespassing structure is allowed to remain, the wrongdoer is responsible for the continuance as furnishing a new cause of action, though he cannot legally enter to remove it without committing another trespass: *Holmes* v. *Wilson* (1). The doctrine of continuing trespass, disapproved of by the learned editor of Williams' Saunders (vol. ii., p. 498, Ed. 1871), and attended with the inconvenience pointed out in Mayne on Damages, has been extended by text writers to trespass of a casual and temporary character, such as leaving a log wrongfully on another man's close.

The cause of action in these cases is not for damages for the original tort: *Johnson* v. *Long* (2); but for its continuance considered as a new wrong. The liability of the trespasser does not depend on any active or intentional continuance of the trespass, which may be involuntary: it goes upon the principle that he is, during his lifetime, bound by all the consequences of his illegal conduct, and is under a continuing duty to discontinue the trespass or remove the nuisance: *Thompson* v. *Gibson* (3). Though I am not aware of any direct authority on the point, I think the doctrine of the continuance of trespass must be subject to the following qualifications. First, where the wrongdoer asks leave of the rightful owner to remove the trespassing structure, and the owner refuses to allow it to be removed, the liability to such owner should perhaps be deemed to determine on such refusal. Secondly, where a new occupier of the trespassing structure may be deemed to have adopted the trespass, and the rightful owner of the premises trespassed on elects to treat such new occupier or owner as responsible, the continuance of the tort ought to be attributed to such new occupier or owner: *Rosewell* v. *Prior* (1). It was assumed in argument that, if the water-course in this case was wholly on the plaintiff's land, the cause of action must have been trespass and not nuisance, and there could have been in that view no continuing cause of action. This may be so, but I prefer to pronounce no opinion upon it. In some cases a party aggrieved may pass over the trespass, and sue for nuisance, as appears from the judgment of Blackstone, J., in *Scott* v. *Shepherd* (2), and the notes to that case in Smith's Leading Cases. In Viner's Abridgment, "*Nuisance*," it is stated that assise of nuisance lies against a defendant for making a trench in the soil of the plaintiff to the nuisance of other lands of the same plaintiff.

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(1) 10 A. & E. 503.

(2) Carth. 455; 1 Salk. 10.

(3) 7 M. & W. 456; 1 Smith's L. C., (6th ed.), 426.

Passing from trespass and coming to nuisance, I am not able to find any difference of principle in this matter of the imputed continuance of a tort. I am dealing with a nuisance created by an act of misfeasance, actionable the moment it is done. Nuisance of this kind is quite outside authorities like *Rich* v. *Basterfield* (3) or *Gwinnell* v. *Eamer* (4), where the nuisance is the result of non-feasance, or of the tenant's subsequent user of the premises, and the cause of action has arisen after a letting, and depends on the duty of landlord and tenant *inter se*. The leading authority as to the continuance of liability for a nuisance actionable *ab initio*, like that before us, is the well-known case of *Rosewell* v. *Prior* (1), reported shortly in 2 Salk. 460, more fully in 1 Lord Raymond, 713, and at length in 12 Mod. 635. The case was argued on special verdict, from which it appeared that the defendant, termor for years, erected a house obstructing the plaintiff's ancient lights, and had been successfully sued by the plaintiff for the nuisance. The defendant, having made a letting of the premises with the house, was again proceeded against, and, the case having been fully argued, was held liable for the continuance of the nuisance. In the reports in Salkeld and Lord Raymond, it would seem as if the decision was based on the letting, and on the view that the defendant as lessor must be taken to have agreed that the nuisance should continue. From the report in 12 Mod. it is obvious that the *ratio decidendi* is much wider, namely, the fundamental principle that he who does the first wrong shall answer for all consequential damages. The Court was of opinion that the wrongdoer could not improve his position by aliening and thereby putting it out of his power to redress the nuisance. The larger view of this case, founded on the report in 12 Mod., is adopted by Nares, J., in *Scott* v. *Shepherd* (1), Parke, B., in *Thompson* v. *Gibson* (2), Blackburn, J., in *Mason* v. *Shrewsbury & Hereford Railway Company* (3), and Sir F. Pollock in his work on Torts, 3rd Ed., p. 381. It would seem from *Rosewell* v. *Prior* (4) that the lessee also could be sued, as had been indeed previously decided in *Brent* v. *Haddon* (5). But the party aggrieved must elect; if he recovered against the lessee for the continuance of the nuisance he could not afterwards go against the lessor. The same principle would apply to all alienations. *Thompson* v. *Gibson* (2) settles the point; it is a conclusive authority that the person guilty of the misfeasance continues liable, though he has no power to redress it. The defendants there had directed and superintended the erection of a building on land of the Corporation of Kendal; the building was a nuisance to the market of the plaintiff, who held under lease. It was held that though the defendants had no power to remove the nuisance, they were liable for its continuance though the lease to the plaintiff was made after the building was erected. Parke, B., considered that the liability lasted as long as the consequences of the wrongful act continued.

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(1) 12 Mod. 635; 1 Ld. Raym. 713; 2 Salk. 460; Carth. 454.

(2) 1 Smith's L. C. 477 (7th Ed.).

(3) 4 C. B. 783.

(4) L. R. 10 C. P. 658.

In my opinion these cases establish that the original wrongdoer during his life remains liable, though the mischief has passed out of his power and control, until the nuisance is determined, or

(1) 1 Smith's L. C. 477.
(2) 7 M. & W. 456.
(3) L. R. 6 Q. B. 578.
(4) 12 Mod. 635.
(5) 2 Cro. Jac. 555.

some other person is proceeded against and made answerable for adopting it.

If a wrongdoer were only answerable for continuance so long as he actively continued the nuisance, there would be an obvious difficulty (as pointed out in *Thompson* v. *Gibson* (1)) in defining the period of liability, where the nuisance was erected on soil in which the wrongdoer had no interest, so that he could not lawfully abate it.

The second point urged is that according to *Clegg* v. *Dearden* (2) the wrongful act of altering the *alveus* was not a continuing trespass, and could not be a continuing nuisance, from the nature of the operation, which was complete and final in itself.

I think *Clegg* v. *Dearden* (2) has only a limited application to the law of nuisance. A nuisance to water-rights in a stream is usually created by a riparian owner at the place where the stream flows through his own lands, and the cause of action is not trespass but nuisance to a natural right, necessarily continuous in its operation. Whether the flow of water is altered by erecting a weir, or by destroying a weir, by making a ditch, or by widening, narrowing, or deepening the *alveus*, the right of the person entitled to the natural flow of the water is infringed, and the mode of infringement would not at first sight appear to be material. So long as the state of things caused by the wrongdoer is continued, the proprietary right of the riparian owner to have the water flow in its natural state is continuously invaded. The wrongful act done is, from the nature of the case, calculated to produce continuous prospective injury, and the right to recover damages may be important as a protection against a claim of prescriptive title.

The acts by which the defendants are alleged to have injured the plaintiff were not any addition to the channel in the form of a weir but apparently some deepening and cutting of the bed of the stream. In considering whether this can be deemed a continuing wrong, we may get some help from the old law.

A nuisance to water-rights might be abated by the party aggrieved, as against the owner, author of the nuisance, without notice, and against a succeeding owner after notice. This is called

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(1) 7 M. & W. 456.

(2) 12 Q. B. 576.

"Reformation" in the Abridgments of Viner and Rolle, and is a kind of self-help still known to the law. So long as the nuisance existed, the party injured was entitled to avail himself of the remedy. It applied apparently to all nuisances injuring the right, and was not limited to structures capable of being thrown down. Thus Viner, "*Nuisance*, S.," mentions that if a man makes a trench in his land, by which the water which runs to my mill is diminished, I may fill up the ditch. Another instance that I met is where the nuisance consisted in the destruction of an ancient weir.

The legal remedies for nuisance were assise of nuisance, and *quod permittat*, applicable as between freeholders, and the action on the case for nuisance, in the case of a termor, or where the wrongdoer was a trespasser. Since real actions became practically obsolete in the 18th century, the only effective remedy for all purposes was action on the case. The assise, which was the most efficacious real action, was for the abatement of the nuisance and for damages. It was a continuing remedy and lay against the original wrongdoer and the ter-tenant alienee. *Quod permittat*, a writ of right, was also a continuing remedy and in form required the defendant to permit the plaintiff to abate the nuisance. According to the note (*a*) in Fitz-Herbert, N.B., 124, H., it was brought against him that did the tort and his ter-tenants after alienation. As *Penruddock's Case* (1) shows, these remedies were available for the owner of the estate for the time being against the owner of the estate where the nuisance was, though not the original author, after a request to the latter to abate it: see Fitz-Herbert, N.B., 124, H. They applied to nuisance for diverting or narrowing a water-course without obstructing it by any added structure.

Thus there was assise for diverting water from a mill by excavating a ditch: Viner, "*Nuisance*, G." There was also assise *quare arctavit cursum aquae*. The form of writ of *quod permittat* given in Fitz-Herbert for lowering or adding to height of a pond and diverting a stream shows that the gist of the remedy was restoration of the ancient and customary flow, and that it did not depend on the form of interference.

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(1) 5 Rep. 100 *b*.

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Gibson, J.

Where the real remedy was not applicable, as in the case of nuisance by a stranger, action on the case lay, and this also was a continuing remedy. The rightful owner, if he continued the nuisance, was liable if after request he did not abate it. Thus a ditch wrongfully made by the prior occupant and continued by the successor not in privity of title was an actionable wrong by the latter: *Palmer* v. *Poultney* (1), *Shalmer* v. *Pulteney* (2). In *Saxby's Case* (3), where the owner was held not liable for a wrongful act of a third party, the defendant had offered to permit the plaintiff to abate, and the Court apparently considered the owner might be responsible if he sanctioned the nuisance or derived benefit from it. *Bowyer* v. *Cook* (4) is an example of the principle.

In my opinion a wrongdoer is liable for the continuing injury resulting from a work constructed by him, and he cannot evade or determine his liability by showing that he has no legal right to determine the nuisance because the soil belongs to some third party. The following illustrations show the application of the rule. A riparian owner diverts water by a ditch; so long as the ditch remains, it is a continuing nuisance to the person whose water-rights are affected by the diversion. A wrongdoer, trespassing on the riparian owner's property and making the ditch for his own purposes, can be in no better position. If instead of making a ditch he lays a pipe the result must be the same. Such a ditch or pipe must be considered a continuing work, just as much as a wrongful weir. Suppose the nuisance is an act of destruction, such as knocking down an ancient weir for the supply of water to a mill, or enlarging or narrowing the *alveus*, or making a new course for the stream, does the same principle apply? There may be considerable difficulty where the act is of a final and irremediable character, as where rocks in a stream are blown up with gunpowder and the course and flow of the water are thereby for ever altered. But where, as here, the alterations made were slight, and the flow could possibly be restored as before, the elements necessary to support continuing liability of the wrongdoer exist. So long as the *alveus* is maintained in its altered condition, so as prejudicially to affect the flow of water, the plaintiff's proprietary right is infringed from day to day. The act done was intended to affect the future flow of water, and from the act, constituting a continuous nuisance to the plaintiff's continuous and apparent easement or natural right, the defendants still derive benefit. If the defendants had, for their own purposes, altered the *alveus* in ground of which they were owners, they could not escape continuous liability for maintaining the channel in its altered state to the plaintiff's detriment. They can be in no better position by adding trespass to nuisance, and being unable to remedy the wrong. They are under an obligation to discontinue the nuisance of which they were the authors.

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(1) 2 Salk. 458.
(2) 1 Ld. Raym. 276.
(3) L. R. 4 C. P. 198.
(4) 4 C. B. 236.

It may be said that it is a hardship on the defendants to expose them to the risk of recurring actions. This argument did not prevail in *Rosewell* v. *Prior* (1), or *Thompson* v. *Gibson* (2); and it might be unjust to plaintiff and defendants alike to assess damages once for all. To the defendants it might be unfair to let the jury find speculative prospective damages for an injury that might be speedily remedied; and the plaintiff might be prejudiced by the evidence of his title being impaired, if he could not sue for the continued infringement of his right. The case of the infringement of a continuous apparent easement by alteration of the *alveus* is very different from the deprivation of support of buildings by excavation, an act which is complete in itself, and which is usually not actionable without damage.

I express no opinion as to the question of damages. So far as the plaintiff complains of the stream being less effectual as a fence, it would seem that a jury might compensate him in a sum sufficient to supply a fence, but not for continuous damages by reason of his omitting to fence.

At an early stage of the argument I formed an impression adverse to the plaintiff, whose contention appeared to me startling and novel; but consideration of English case law, particularly *Rosewell* v. *Prior* (1), and *Thompson* v. *Gibson* (2), has induced me to form a conclusion in his favour. The decision, however, goes beyond any previous authority, and cannot be regarded as free from doubt, especially having regard to the judgments of my brethren.

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(1) 12 Mod. 635.

(2) 7 M. & W. 456.

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HOLMES, J.:—

It is a maxim of our law that only one action can be maintained by the same person for the same actionable wrong. If the old authority that seems to lay down that a person who has recovered general damages for a libel can bring another action claiming special damage for the same libel would not now be followed, I am not aware of any exception to the foregoing rule. The cases, of which *Daly* v. *Dublin, Wicklow, and Wexford Railway Company* (1) is an example, are not inconsistent with it, inasmuch as in them the second action, although brought for the same wrong as the first, was for the benefit of a different class of persons. Nor is *Darley Main Colliery Company* v. *Mitchell* (2) an exception, for there the acts of the defendant were not originally wrongful. They became so when and as damage resulted from them; and with the appearance of fresh damage there came into existence a new and independent tort. Concurrently, however, with the rule that only one action is permitted for one wrong, there is the principle that if a trespass or the interference with a right is continuous in its character, it is regarded as a succession of wrongs, for which action after action may be brought as long as the trespass or interference continues. Continuous torts are simple enough in theory, but it is not always easy to distinguish them for practical purposes. A man builds a wall on another's land. This is a continuing trespass, and a judgment against the wrongdoer will not be a bar to a second action, if the wall is permitted to remain. On the other hand, a man digs a hole or cuts down a tree on another's land, and only one action can be brought. So, too, a house is built or altered in such a way as to interfere with the access of light through the ancient windows of a neighbouring house; this is a continuing wrong, and there may be a succession of actions until the obstruction is taken away. On the other hand, where the removal of a house deprives an adjoining house of the support to which it is entitled, damages must be sued for once for all. What is the principle that underlies these distinctions? It cannot depend upon the nature of the injury sustained, or upon the fact that such injury is of a continuing character.

(1) 30 L. R. Ir. 514.

(2) 11 App. Cas. 127.

The right to enjoy one's land free from the incumbrance of a wall does not differ in kind from the right to enjoy it free from the inconvenience of a hole. The element of continuity must, I think, be looked for not in the right interrupted but in the acts that cause the interruption. Where a man commits a trespass by placing something upon another's land, it is reasonable to regard him as responsible for its continuance until he takes away what is in its nature removeable, or until the owner of the lands by refusing him permission to remove it adopts what has been done. But a tree cut down is gone for ever. Compensation can be made for it, but it cannot be brought back. So, too, in the case of an excavation; it may no doubt be filled up, but not so as to make the excavated place what it was before. An equivalent can be given, but restoration, strictly speaking, is impossible. The distinction I have suggested will be found to accord with ordinary thought and language. We naturally think and speak of the man who has built a wall as keeping the wall where he had placed it. He has taken possession of certain land by building on it, and he retains possession of it as long as the building is allowed to stand. No such idea attaches to the person who makes an excavation or cuts down a tree. He may retain for his own use, or otherwise dispose of the matter excavated, or the timber, but his trespass on the lands ceases when the act is done. So, too, in the case of interference with the easements to which I have referred. We speak of the wrongdoer as obstructing the access of light and air as long as the obstruction continues, but once the support to which an adjoining house is entitled has been removed, the injury is described in the past tense.

For these reasons, I think the true test of whether the tort is continuing or not is whether the act of trespass or interference is in its nature continuing, and not whether the consequences of such an act continue to be felt. I admit that it is often difficult to apply the test to individual cases; and I am not aware that the question has been considered in circumstances precisely similar to those with which we are dealing. The defendants, in the year 1887, dug holes and cleared out the course of the rivulet where it forms the boundary between the lands of the plaintiff and Lord Perth. It is admitted that these were wrongful acts, but they have never been repeated. It is said that the effect was to alter the current, and change the character of the stream. The consequences of what was done by the defendants in 1887 probably continue to the present time, and may last for ever. But I can see nothing in the acts of the defendants as distinguished from the consequences of those acts that gives them a continuous character. A man who has lost his eyes through the trespass or negligence of another is deprived of sight during the remainder of his life; but, as far as the wrongdoer is concerned, he was guilty of only a single wrong. It would now be impossible, as well from the nature of the original act as from the intervening operation of natural causes, to restore the stream to its original state; and it seems to me that the plaintiff was entitled to seek, and ought to have sought, in his first action, all the damages—past, present, and prospective—flowing from the defendants' interference.

I have no doubt that the amount awarded in the first action was intended by the jury to compensate him both for his past and future loss, and was, as a matter of fact, far in excess of the true estimate of such loss. Of course neither the view taken by the first jury, nor the extravagant verdict given by them, would be an answer to the present action if the wrong complained of is continuous. I have stated my reasons for holding that it is not. If this case is contrasted with *Devery* v. *The Grand Canal Co.* (1) the distinction which I have attempted to draw will be illustrated. There the defendants had inserted circular metal pipes in wooden tunnels that conveyed a stream through an embankment, the defendants' property. It was held that the original act was wrongful, and that the subsequent retention of the pipes in the position in which they had been placed constituted a continuous wrong. In this action the defendants have done nothing, either actually or constructively, since 1887, although the effects of what they then did still remain.

The result is that, in my opinion, the defendants are entitled to judgment. I may add that, if it were necessary to assume (as I think it is not), in support of the conclusion at which I have arrived, that that which was done by the defendants is now irremediable, in the sense that it is now impossible to restore the stream to its original state, I should have no hesitation in making the assumption. The basis of the plaintiff's case is that the defendants' acts made a substantial alteration in the character of the stream. If this be so, it is clear to my mind that restoration is now as impossible as if rocks in the bed of the stream had been blasted with gunpowder.

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(1) Ir. R. 9 C. L. 194.

O'Brien, J. :—

In this case a question is raised, the statement of which alone involves no small novelty, whether, under the circumstances, an action can be brought to the end of time for an act of trespass, on new damage occurring from it. The defendants, a Railway Company, in the year 1887, for the purpose of increasing the supply of water to a reservoir, excavated the bed of a stream on land belonging to other persons, for which an action was brought against them in the year 1892 by one of the riparian owners, complaining of diversion and obstruction of the water and of trespass, and damages were recovered by him. Afterwards the present action was brought for damage of the same kind occurring in the interval since the former recovery, upon pleadings exactly similar, with the result that fresh damages were awarded by the jury; and the question is whether such an action is maintainable. The test of this question was admitted to be whether the whole of the damage, present and prospective, could have been legally recovered in the first action; for, if that could legally have been done, it must be assumed to be the result of the first verdict, in order to give effect to the principle *nemo bis vexari pro eadem causa debet;* and that, again, depends upon the question whether an action for continuing damage lies at all against persons in the situation of the defendants, and in reference to an act of the nature complained of. The report states that the defendants' acts consisted in digging holes in the bed of the stream and scouring it in certain places, which the jury found had the effect of interfering with the natural flow of the stream, though the damage which the plaintiff proved was not the deprivation of the water for any purpose whatever, but that the stream was reduced in volume, and from that cause was less useful to prevent cattle trespassing on his land. I do not find anything in the report which sustains the statement that the Company are still in possession of any advantage from what they did; but the presumption is, in the absence of any evidence, that they still use, or are capable of making the same use of, the stream. The plaintiff, therefore, must rest his case entirely upon the liability arising from the continued interference with the natural flow of the water, for I do not know of any authority for the proposition that the diminished use of the stream as a boundary of land is such a thing as constitutes continuing damage at all within the rule. Was this, then, such a matter for which the plaintiff was entitled to be compensated out-and-out in the first action, or was it a matter in which a fresh action was necessary, in which a new cause of action arose merely from the lapse of time, without any other act or consequence happening, so that the plaintiff could measure off at his will, not merely half a-year, as in this instance, but any space of time, however small, at his option, and be entitled to have repeated actions for ever? For, I think, we must take it as the result of the evidence that the bare fact of interference with the natural flow of the stream continuing is that upon which alone the plaintiff must rely as giving a new cause of action. The consequence is certainly somewhat startling, for, in this case, the defendants cannot discharge themselves to the end of time from liability, having no power to enter the lands and undo the injury; and, in the case of a Company, those who became new shareholders will succeed to an unknown liability not incident to the nature of the undertaking. And this is a result contrary to the usual analogy of the law, which provides a satisfaction for every kind of injury, and does not allow property, any more than wrong, to be perpetual. But there are several cases in which the same condition is to be found—that the defendants could not remedy their act without being trespassers, and in which they were held to be liable notwithstanding; and the argument, in those cases, was that a wrongdoer could not be in a better position than a rightful owner doing something on his own land which causes mischief to another. Of course, this argument begs the proposition in one sense—for, if the whole damage, present and contingent, can be recovered, in the first instance, against the wrongdoer, he is not necessarily in a better, though in a different, position. However, in all the cases where a new action was held maintainable for continued trespass, the same objection would have lain, for the trespass necessarily implied that the land belonged to another. That was the case in *Holmes* v. *Wilson* (1), where the trustees of a turnpike road had made buttresses on the plaintiff's land, outside their limits of deviation, and they were held liable in a second action for continuing them after notice, though they had done no positive act of any kind in the meantime. Logically, perhaps, the defendant has not a right to complain that he ought not to be held liable because he cannot come upon the land again to remedy the wrong, when he came upon the land at first to commit it.

Littledale, J., in that case says:—"If the defendant throws a heap of stones upon the defendant's land, and there leaves them, will trespass lie from day to day till they are removed?" But the surprise of the Court yielded to authority, for the judgment was entered for the plaintiff. In like manner Baron Parke says in *Thompson* v. *Gibson* (2), during the argument:—"The defendants not being in possession of the soil have no power to remove the nuisance." Nevertheless, he was the judge who pronounced the judgment of the Court, holding the defendants liable, although they were in that situation that they could not enter the land without being trespassers. My own mind in this case has gone through a similar course of surprise and reflection, ending however in the conclusion, as the result of an accumulation of authority—of decided cases and statements of the law, out of which I cannot possibly see any way—that the defendants are liable to continued actions, so long as the flow of the stream continues to be interfered with, though they have done no new act—though they have no relation to the property, and even though the plaintiff possessed himself the power to restore things to their former state—and that the only check upon the oppressive use of such a right must remain in the sense and justice of the jury. For, if it were found that the mischief could be remedied, and that the plaintiff would not do it himself, or allow it to be done, it would be a monstrous thing to give him any damages. The principle was acted upon in *Penruddock's Case* (1); in *Rosewell* v. *Prior* (2); and *Thompson* v. *Gibson* (3); *Holmes* v. *Wilson* (4); *Westbourne* v. *Mordant* (5); and others of the same class; and in all the cases decided on the consequences of mining excavations, in which, though the question arose upon the Statute of Limitations, the test was, whether there was in law a new cause of action. And the discussions that are to be found in the early books as to the distinctions between the assise of nuisance, the suit of *quod permittat*, and actions on the case, are all concerned solely with the relations of the parties in reference to the freehold, and the effect of the statute of Edw. 3 as to alienees of the land; and all assume the point of liability. The rule is repeatedly stated in the text-books to the same effect. Thus says Comyn's Digest, "Nuisance," B.:—"An action upon the case lies against him who erects a nuisance. So, against him who continues a nuisance erected by another"; and he puts the case of a person who diverts water by artificial means, and another person afterwards using the water by the same means, which he says is a new nuisance. "So, if a man erect a house or mill to the nuisance of another; every occupier afterwards is subject to an action for the nuisance. So, if a man recover against A for the erection of a nuisance, he may afterwards maintain an action against him for the continuance, though he had made a lease of it to another. Or, he may have it against the lessee of A for the continuance, at his election."

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(1) 10 A. & E. 503.

(2) 7 M. & W. 456.

For this last proposition, the report of *Rosewell* v. *Prior* (2) in Salkeld is referred to; and Mr. Justice Gibson has called my attention to the fact that, so late as Law Reports, 6 Q. B., at p. 585, that case is quoted as an authority for the liability of defendants after they had parted with the estate.

The same rule is stated as to an action by the lessee, as well as against the lessee in 2 Rolle's Abridgment, p. 142, as follows:—"If one is seized of land near a river and another stops it with loads of earth, and the tenant of the land adjoining leases to another for years, and then the stoppage continues, by which the land of the lessee is surrounded, the lessee shall have an action on the case against him; for though the stoppage was in the time of his lessor, the continuance was a wrongful damage to the lessee, for his land was surrounded." *Clegg* v. *Dearden* (1), which was relied on for the defendants, is clearly not in point; for it was a simple trespass causing damage, and it was, as Patteson, J., said, "just as if a man broke another's leg, and an action was brought against him for not setting it."

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(1) 5 Rep. 100 *b*.

(2) 2 Salk. 460; 12 Mod. 635.

(3) 7 M. & W. 456.

(4) 10 A. & E. 503.

(5) Cro. Eliz. 191.

This is a case of water flowing naturally and stopped or obstructed; and I take it that an action lies equally, whether the plane or level in which water flows, or the direction, is altered. Now it is certainly true that it is not very easy to see the distinction —in reference to continuing damage that gives a cause of action— between obstruction and addition of a substance, between building a house on another man's land and knocking down a house, between digging a hole in land and digging it in a river, between even personal trespasses and those to land, between such a grievous wrong as the loss of sight and the loss of light. But, while, in a certain sense, every injury is attended with continuing damage, and it might not be possible to lay down any distinction that would be consistent with all the instances—and it is sufficient for the purpose of law to adhere to the lines of positive decision—the acts, nevertheless, which amount to an exclusion from the occupation of land, or the continued interference with the necessary conditions of the enjoyment of property, furnish a general ground of difference, within which the cases of continuing damage, as distinguished from simple trespass, will be recognised as falling. Continuing damage is not what gives rise to a fresh cause of action, but continuing damage from a continuing and subsisting cause. As to the case of flowing water the principle is undoubtedly distinct; for the damage results from the act of trespass with the accession of another element always coming into existence and of variable conditions. What was said by one of the judges in the case of *Westbourne* v. *Mordant* (2) comes close to the point of the matter:—"It may be the nuisance was not by the stopping, but the running of the water." The case is certainly novel, with reference to the question of a fresh action, though not as to an original action for the diversion of water, in this respect that the trespass which has caused the injury consists in taking away part of the soil instead of putting anything into the stream; and, therefore, we could find a reason for stopping where decision has stopped, if we could see anything in the instance that would limit the application of the principle. But without any such ground of restriction, I consider that it is impossible for us to refuse to apply a rule of law that is found to have been so often affirmed and acted upon, and therefore that the plaintiff is entitled to judgment.

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(1) 12 Q. B. 576.

(2) Cro. Eliz. 191.

HARRISON, J.:—

The report of the Lord Chief Justice states briefly the point for decision in this case, namely, whether the plaintiff can recover as for a continuing injury, no act having been done since 1887, and the first action having been brought since the works which caused the lowering of the stream were executed.

The acts committed by the defendants which are complained of are stated to have been committed in 1887. In March, 1892, the plaintiff obtained a verdict and judgment for £40 in respect of these acts. The said acts were committed in the bed of a stream which ran through land in the possession of the Earl of Perth and of the plaintiff or his under-tenants, the stream dividing the respective lands of the Earl of Perth and the plaintiff. The result of the commission by the defendants of the said acts was to lower the stream and affect prejudicially the rights of the plaintiff as a riparian proprietor of portion of the lands through which said stream flowed.

No fresh act would appear to have been committed by the defendants since 1887. The acts then committed were, in my opinion, in the nature of trespasses on the lands of the plaintiff and his under-tenants, and of the Earl of Perth; and, an action having been brought by the plaintiff and damages recovered for their commission and for the injury consequent thereon, I am of opinion that no fresh action can now be maintained for any continuing injury which the plaintiff may have sustained since the former action in consequence of the commission by the defendants in 1887 of the acts complained of, and that the damages and judgment recovered in the former action are a bar to the maintenance of any further proceedings.

Gibson, J., as junior judge, having withdrawn his judgment, judgment was entered for the defendants, with costs.

A. E. R. J.

Appeal.
Nov. 30.
1894.
Jan. 30.

The plaintiff appealed (1).

Roche, *Q.C.*, *J. R. Stritch*, and *Fetherstonhaugh*, for the appellant.

Nolan, *Q.C.*, *Meredith*, *Q.C.*, and *Butler*, for the respondents.

The arguments were the same as in the Queen's Bench Division.

Walker, C.:—

Jan. 30.

This is an action against the defendants for interfering, to the plaintiff's damage, with the natural flow of water in a river in the water of which the plaintiff as a riparian proprietor had riparian rights. The action was brought on the 15th November, 1892, and the jury found a verdict for £15. The defendant pleaded among other defences a judgment recovered in a former action between the same parties on the 24th March, 1892, for the sum of £40. The river in the place in question flows between the lands of the plaintiff and Lord Perth, and the defendants, in the year 1887, by digging holes in the *alveus* and scouring the bed of the river, interfered with the natural flow of the stream. Those acts were done partly on the lands of Lord Perth and partly on the lands of the plaintiff. The object was to carry water to a reservoir to be used for the defendants' purposes. There was no evidence that any further acts of excavation or scouring were done by the defendants since 1887.

(1) In the Court of Appeal, before Walker, C., Porter, M.R., and Fitz-Gibbon and Barry, L.JJ.

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Walker, C.

The present action was tried before the Lord Chief Justice, and his certificate states:—"The jury in the present action are to be taken as having found that the same acts, that is the acts done in 1887, have the effect of continuing the lowering of the stream and interference with the natural flow thereof, and causing in the manner indicated the damage complained of. The Court is to be at liberty to draw inferences of fact, and to amend pleadings if they think fit."

Counsel for the plaintiff, in pursuance of leave reserved by the Lord Chief Justice, moved that judgment should be entered for the plaintiff for the sum of £15. The case was argued, with the result that O'Brien, J., and Gibson, J., were of opinion that the plaintiff was so entitled, but Harrison, J., and Holmes, J., were of opinion that the defendants were entitled to judgment, and that the former judgment covered all damages to which the plaintiff was or thereafter would be entitled. Gibson, J., withdrew his judgment for the purpose of enabling an appeal to be brought. Under the circumstances we are obliged to consider the case without the aid of any preponderance of judicial opinion in the Court below.

It is easy to state the maxim, *Nemo bis vexari debet pro eadem causa*, or to say that damages cannot be recovered more than once for the same cause of action; but this leaves it necessary still to determine what is the cause of action. It must be admitted that there are many cases where a second action can be brought, into which still the original act which contributed to the first action or cause of action enters, and which first action could not have had existence without it, and this consideration leads to an ambiguous use of the words "cause of action." A consideration of the cases leads me to the conclusion that there may be a continuous cause of action, and that where this exists a recovery of damages with satisfaction will not operate as a purchase of the right to continue it, and bar a fresh action; and there may be also a cause of action for an act done involving consequential damages capable in fact of being estimated only by speculation, but yet in respect of which only one action can be brought. The difficulty is to determine under which of these heads a particular case ranges, but the mode of raising the difficulty may be at least in one or other o three ways—(*a*) By cases where the question is whether damages estimated by speculation for the future can be recovered, as in *Lamb* v. *Walker* (1); (*b*) Whether a judgment recovered in a former action is a bar, as in the present case, and *Rosewell* v. *Prior* (2); and (*c*) Whether a plea of the Statute of Limitations is a bar, as in *Devery* v. *Grand Canal Company* (3). In each of these cases the question is the same, viz.: Is the cause of action only one and final, or can there be a fresh cause of action, though there is a common act, a factor in the creation of both, or without which the cause of action would not have had existence? The line must often be finely drawn which distinguishes the two cases, but I think there is a principle running through them all, the application of which is the only difficulty. For instance, take the two cases in the same Court, of *Holmes* v. *Wilson* (4), and *Clegg* v. *Dearden* (5). In the first of those cases the defendants, under the powers given by a statute raised an embankment supported by a wall on a line of road which passed through the plaintiff's land, and they also, without her consent, and without authority under the Act, erected buttresses to support the wall on her land outside the statutory limits of deviation. An action of trespass was brought for erecting the buttresses and keeping them on the land, and in that action a sum of £25 was paid into Court, which the plaintiff accepted in satisfaction. Some months afterwards, after notice to remove, she brought a second action of trespass and for keeping and continuing the buttresses on her land, and it was held the action could be sustained. During the argument, Patteson, J., says:—"How can you convert the recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it.". The difficulty of the defendants' position was illustrated in the argument of their counsel in this way. "The defendants have no right to enter the plaintiff's land without her leave in order to remove the nuisance, so that unless the plaintiff removes it herself the defendants will be exposed to continual actions or be obliged to commit a further trespass by removing it."

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(1) 3 Q. B. Div. 389.
(2) 12 Mod. 635.
(3) Ir. R. 9 C. L. 194.
(4) 10 A. & E. 503.
(5) 12 Q. B. 576.

Lord Denman, in giving judgment, said:—" The former and the present action are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road under such circumstances was a fresh trespass."

In the other case of *Clegg* v. *Dearden* (1) the owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine through which water passed into it, and did damage. An action on the case was brought for making the aperture and letting in the water, and, under an award made on it, the plaintiff recovered. The plaintiff afterwards brought a second action on the case for wrongfully keeping and continuing open an aperture made by the defendant from the mine, by means whereof water continued to flow from the defendant's mine into the plaintiff's. It was held that the former recovery was a bar, but on the ground that the cause of action, as the Court defined it, was not a continuing one. Lord Denman says:— "It is not, as in the case of *Holmes* v. *Wilson* (2), a continuing of something wrongfully placed by the defendants upon the premises of the plaintiff, nor is it the continuing of something placed upon the lands of a third person to the nuisance of the plaintiff, as in the case of *Thompson* v. *Gibson* (3). There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass, but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor of a nuisance, nor is it the breach of any legal duty." It appears the case went to the Exchequer Chamber,

(1) 12 Q. B. 576. (2) 10 A. & E. 503. (3) 7 M. & W. 456.

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where it was compromised by the parties agreeing that proceedings should be stayed, that the plaintiff should give a release to the defendant, and that no costs should be paid on either side. If the case had been like *Holmes* v. *Wilson* (1), or *Thompson* v. *Gibson* (2), the result would have been different.

There is another class of cases, of which *Darley Main Colliery Co.* v. *Mitchell* (3) is the governing example, to which it is desirable to refer. The owner of coal may lawfully excavate under the land of the owner of the surface; but if in the exercise of that right he causes damage by creating a subsidence, arising from the withdrawal of support, such damage creates a cause of action, and when such damage afterwards recurs, there will be a fresh cause of action, though the original act of excavation enters into it. Lord Halsbury says:—"The words 'cause of action' are somewhat ambiguously used in reasoning upon this subject. What the plaintiff has a right to complain of in a Court of law in this case is the damage to his land—and by *the* damage I mean the damage which had, in fact, occurred; and if this is all that a plaintiff can complain of, I do not see why he may not recover *toties quoties* if fresh damage is inflicted." He proceeds:—"Since the decision of this House in *Bonomi* v. *Backhouse* (4), it is clear that no action would lie for the excavation. It is not, therefore, a cause of action. That case established that it is the damage, and not the excavation, which is the cause of action." Lord Blackburn dissented from the majority, but he recognises the principle within which, it seems to me, the present case comes. He says (p. 143):—"I should say that I take a very different view of *Whitehouse* v. *Fellowes* (5) from that taken by the Master of the Rolls. I think that was an action for maintaining a nuisance, which, from time to time, caused fresh damage. What Williams, J., there says is:—'The true answer to this objection, as it seems to me, is that no fresh cause of action arises from each fresh damage; but that where there is not only a fresh damage, but a continuance of the cause of damage, such continuance of the wrongful act which caused the damage constitutes a fresh cause of action.' This," he says, "was how the Court of Error, in Dublin, understood that case in *Devery* v. *The Grand Canal Co.* (1)"; and he adds, "that if he could take the view of the facts to be that there was a continual withdrawal of support he would agree with the majority."

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(1) 10 A. & E. 503.
(2) 7 M. & W. 456.
(3) 11 App. Cas. 127.
(4) 9 H. L. Cas. 503.
(5) 10 C. B. (N. S.) 765.

Let us see in the present case whether we can find not only a fresh damage, but a continuance of the cause of damage, and how far there is authority for so holding. If the natural right to light be sensibly and materially obstructed by a building on the land of another, such fresh act of obstruction is an actionable wrong, for which and consequential damages an action may be brought; and if the erector continues it, such continuance will justify the bringing of a fresh action for the continuing damage: *Rosewell* v. *Prior* (2) and *Shadwell* v. *Hutchinson* (3); and the original erector remains liable for such further action, though he has demised the ground to another, because the putting it out of one's power to abate a nuisance is as great a tort as not to abate it when it is in your power to do so. For this last point *Rosewell* v. *Prior* (2) is also an authority.

Take, then, the case of an interference with another natural right—the right of a riparian owner to the flow of a natural stream, and to maintain an action for a sensible interference with it. The case of *Devery* v. *The Grand Canal Co.* (1) is an express authority that if a man by acts on his own lands obstructs the flow of a stream, he is liable in successive actions for the continuing damage, though there the original act of obstruction was itself a wrong importing damage. In Comyn's Digest, "Action on the case for a nuisance (B)," it is said:—"So against him who continues a nuisance erected by another, as if A diverts water by a pipe and cock to his house, an action lies against his wife after his death, if she lives in the house and uses the water, for every turning of the cock is a new nuisance." Can it make a difference in this case, that the acts of the defendants creating the continued interference with the natural flow are partly on the lands of the

(1) Ir. R. 9 C. L. 194. (2) 12 Mod. 635. (3) 2 B. & Ad. 96.

plaintiff and partly on the lands of a third party, over whom they have no control? It seems to me that this point is covered by the decision in *Thompson* v. *Gibson* (1). There the defendant erected in *alieno solo* a building which obstructed a market, and after the erection of it the plaintiff became lessee of the market: it was held that the defendant was liable for continuing the obstruction. The point is put during the argument by Parke, B., page 458:—"The defendants not being in possession of the soil have no power to remove the nuisance." He goes on to say in his judgment—"It was contended . . . . that though they were guilty of erecting, they could not be considered as having continued the nuisance, because they were not in possession of, or interested in, the soil on which the building was erected." Then he says:—"It was argued, however, that the assignee or lessee was not without remedy. He might abate the nuisance, but that affords no compensation in damages, and may, in some cases, be an expensive remedy. . . . It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the Corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it, without exposing themselves to another action."

I think these observations apply almost more strongly to the continued interference by the defendants for their own benefit with the flow of the stream caused by acts wrongfully done on the lands of Lord Perth and the plaintiff, and on principle and authority I think that the opinions of O'Brien, J., and Gibson, J., were right, and that the verdict should be entered for the plaintiff, with costs here and in the Court below.

Porter, M.R., and Fitz Gibbon and Barry, L.JJ., concurred.

Solicitor for the plaintiff: *H. J. Concannon.*
Solicitor for the defendants: *J. Kilkelly.*

R. D. M.

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(1) 7 M. & W. 456.

Appeal.
1895.

Jan. 22.

CURLEY *v.* GREGAN (1).

***Practice—Remittal to inferior Court—Action fit and proper to be prosecuted in superior Court—Appeal—Discretion of Court below—Common Law Procedure Act,* 1870, *sect.* 6.**

In an action brought to recover damages for personal injuries from the bite of a vicious ass belonging to the defendant it was proved by affidavits that the plaintiff, a boy thirteen years of age, had entered a cowhouse of his employer, in which the ass had been temporarily left by the defendant, tied up in a stall, when the plaintiff was attacked by the ass, which bit him in the leg, dragged him into the manger, and lacerated his leg. The plaintiff had suffered severe injury, part of the bone of the leg had been destroyed, and he had been rendered unable to work:—

Held (reversing the decision of the Queen's Bench Division, Fitz Gibbon, L.J., *diss.*), that a motion to remit the case to the County Court should be refused.

Appeal from an order of the Queen's Bench Division remitting the case for trial before the County Court of Meath at Trim.

The action was brought to recover damages for assault by an ass, and the endorsement on the writ stated that the defendant wrongfully kept a fierce and mischievous ass, accustomed to attack and injure mankind, as the defendant well knew. The ass attacked and injured the plaintiff, a boy thirteen years of age, employed as messenger and general assistant by one Thomas Byrne, a licensed vintner and provision merchant in Dunboyne, in the county of Meath. The defendant left an ass, his property, in a cow-house in the yard attached to the provision shop of Thomas Byrne, and the plaintiff having entered the cowhouse for the purpose of cleaning it out, was then, as the plaintiff alleged, attacked by the ass belonging to the defendant, which caught him by the leg, knocked him down, pulled him into the manger, and lacerated his leg. A portion of the calf of the plaintiff's leg was eaten away, and the shin bones and sinews were lacerated. The plaintiff had not been able to work since the accident, and it was stated that this ass had previously bitten other people.

(1) Before Walker, C., Porter, M.R., and FitzGibbon and Barry, L.JJ.

The medical evidence, that of Dr. M'Ardle, proved that he examined the plaintiff on the 28th November, 1894, the accident having happened on the 11th June, and found that he had sustained extensive laceration of the soft tissues, tendons, and muscles of the leg, and severe injury to the shin bone, which led to the death of part of its substance, and that at any time he might suffer from inflammation in the neighbourhood of the wounds, and further destruction of the bone. The leg would never be restored to its normal condition.

The plaintiff had no visible means.

The defendant, by the affidavits filed to oppose the motion, denied every material averment made by the plaintiff. He denied that he was guilty of negligence, as the ass was properly tied up, and asserted that the plaintiff had endeavoured to get upon the back of the ass. He procured affidavits from the two men, alleged to have been previously bitten, denying the fact. He stated that the plaintiff was guilty of contributory negligence, and denied that the plaintiff had suffered injuries of the grave nature which he asserted.

D. Kehoe, for the appellant:—

The Court of Appeal will not interfere with the discretion of the Court below, unless satisfied that the discretion is wrongfully exercised. Here we submit that it has been wrongly exercised, unless the Court is prepared to lay down the rule that no poor man shall bring an action in the superior Courts. "Fit to be prosecuted in the superior Court" in sect. 6 of the Common Law Procedure Act of 1870 does not mean that large damages must be recovered, but that the plaintiff has a case of so serious a nature that it would be more fit to be tried in the superior Court: *Farrer* v. *Lowe & Co.* (1). The injury to the plaintiff here is so serious that he is unable to work, and is probably injured for life. That distinguishes the case from *Marron* v. *Hunter* (2). It was conceded there that the Court of Appeal would, in a very strong case, reverse the decision of the Court of first instance on the question of the exercise of discretion.

On the question of expense, and the balance of convenience, it

(1) 5 *Times*' Rep. 234.

(2) 23 Ir. L. T. R. 2.

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is almost the same trying the case in Dublin and trying it at Trim, to which the Court below remitted it. The plaintiff resides at Dunboyne.

Ignatius O'Brien, for the respondent :—

The Court will not interfere with the discretion of the Court below, even although this Court might have been disposed to come to a different conclusion. This case is governed by *Marron* v. *Hunter* (1).

WALKER, C. :—

We have heard this case fully argued, and I have come to the conclusion that the case is a fair one to be tried in the superior Courts. I have no doubt that I would have said so had I been sitting in the Court below when this case came before it. The only difficulty I feel is whether we ought to interfere with the discretion of the Court below, especially when that discretion apparently was not exercised on any wrong principle of law. At the same time I think it is our duty when a case comes here on appeal, which, on its facts and circumstances is, in our judgment, fit to be tried in the superior Courts, that we should so hold. I do not go into the merits of the case at all, as any remarks of mine might be used to affect in some way the trial of the action. Having regard to the nature of the injury inflicted by a savage animal on the plaintiff, the questions that may arise, and all the circumstances, I think it is not a case to which the Act of Parliament was intended to apply, or should apply, and therefore that the appeal should be allowed, and the action proceed in the superior Courts.

PORTER, M.R. :—

The question here is, has the plaintiff a fit cause of action to be tried in the superior Courts? and such a question will no doubt present itself in a different way to different minds. But whilst I entertain the greatest respect for the opinion of the Judges in the Court below, it seems to me that the plaintiff here has presented a case as to which, apart from this Act of Parliament, it would never have entered into anyone's mind to say it was not a fit case for trial in the superior Courts. The affidavits raise almost every matter of difficulty and importance that could possibly be raised in such a case, including that of negligence, of the degree of knowledge the defendant is charged with as to the savage nature of the animal, and of contributory negligence. There is, too, a very startling discrepancy in the testimony, and the injuries mentioned by the plaintiff were, in my view, of great gravity. On this appeal I think there is nothing to disentitle the plaintiff to the benefit of the opinion we all hold as to the fitness of his case to be prosecuted in the superior Courts, and that the case should be left where it was commenced.

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(1) 23 Ir. L. T. R. 2.

Fitz Gibbon, L. J.:—

If I were in the Court below, I should have held that the case was fit to be prosecuted in the High Court. But having regard to the course of authority, both in England and here, I am unable to concur in reversing the decision of the Queen's Bench Division. No doubt such decisions are not absolutely discretionary, but it appears to me that by disturbing judgments of this sort, on a mere difference of opinion, we encourage experimental appeals, which involve no principle. It is not enough to say that we think that the case is a fit one to be tried in the superior Courts. The Queen's Bench has thought otherwise. Where the inability of the plaintiff to pay the costs is clear, he must satisfy the Court that the case is fit for the High Court, and he can, in any case, have it tried there by giving security for a *modicum* of the costs, which otherwise may ruin the defendant, even if he succeeds, or may leave nothing for the plaintiff, even if he is awarded damages. In face of the unanimous decision of four judges on a matter on which different people may fairly come to different conclusions, I cannot set up the Court of Appeal against the Queen's Bench Division. The public interest, as well as authority, is against this, and I do not think that we ought to reduce the practice to chance and speculation.

In *Marron* v. *Hunter* (1) the plaintiff was as seriously injured as the plaintiff here was, under circumstances presenting more difficult issues both of fact and law. We required the defendant there to state whether he intended to raise any other matters than those which are raised here, viz. negligence, contributory negligence, and amount of damages, and we affirmed the decision when the case was reduced to those questions. *Scienter* here is material only on the issue of negligence; the ass was admittedly left securely tied up in the stall; he did not break loose, and it does not clearly appear why or how the boy came within his reach. In my opinion, the decision of the Queen's Bench should be affirmed.

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(1) 23 Ir. L. T. R. 2.

BARRY, L.J.:—

While I concurred in the decision of *Marron* v. *Hunter* (1). I did so reluctantly, because I thought that the cases were going too far in applying what is called the "Sham Actions Act" to cases to which it was not intended to apply. The injuries sustained by the boy in that case were not so serious as those alleged to have been sustained by the plaintiff here. The injuries may, in this case, turn out to be exaggerated. I shall not try the facts on affidavits; all I say is, I recognise no case in England or Ireland deciding that this Court is not entitled, nay, bound, in a proper case, to review the remitting of an action by a Court of first instance. It has of course been laid down again and again that in these *quasi* discretionary cases the Court of Appeal is slow to disturb the exercise of discretion by the Court of first instance, but I never said, or was party to, more than that. In my judgment in *Marron* v. *Hunter* (1), I said:—"Having regard, however, to the admissions that have been made, and having regard to the rule of the Court of Appeal that it will be slow to reverse a discretionary order of the Court below, I concur in the order remitting the case on the conditions that have been mentioned." I referred there to certain concessions made by the defendant, which were beneficial to the plaintiff.

I have acted on that rule, and have been, and am, very slow to disturb these *quasi* discretionary orders. Here, it seems to me, I am asked to go further, and hold myself bound to remit a case, though I am satisfied it is a fit case for the superior Court. Having regard to the injuries sustained, if the case of the plaintiff be true, I am of opinion that this boy should not be deprived of his right to seek redress in the highest Court for the dreadful injury inflicted on him by this fierce animal.

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(1) 23 Ir. L. T. R. 2.

This Act was passed for the purpose of suppressing frivolous and vexatious actions, such as are brought to levy blackmail, *et cetera*. To decide this case otherwise than as we are doing would be virtually, as Mr. Kehoe has said, to establish a rule that no poor man can bring an action in the superior Courts for any wrong, however grievous, unless he can give security for costs. I find no authority for that proposition, and I am not prepared to be a party to making a precedent.

Solicitors for the plaintiff: *Brown & M'Cann.*
Solicitor for the defendant: *M. C. O'Meara.*

R. D. M.

GYLES, Lessors; BEAUSANG, Lessee (1).

Land Com.
1894.
Oct. 27.
Dec. 3.

Redemption of Rent (Ireland) Act, 1891 (54 *&* 55 *Vict. c.* 57)*—Effect of redemption under—Consent by lessors to redemption—Lease in excess of powers—Inability to make title—Specific performance—Jurisdiction of Land Commission.*

A lessee for a term of years, applying to the Land Commission under the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), is not entitled to a conveyance in fee of his holding, but to an extinguishment of all rent during the residue of his term, with the protection from all superior rents or rent-charges afforded by their redemption under the powers given by sect. 2 of the Act.

By deeds, executed on the marriage of M and N, in 1863, lands were vested in trustees, on trust, at the request of M (the wife) and N (the husband), during their joint lives to sell, and with power to the trustees before sale at the like request, to lease for thirty-one years. The trusts of the sale moneys, and of the lands until sale, were for M during the joint lives of herself and N, for her separate use, for the survivor for life, and then for the

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(1) Before Bewley, J.

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GYLES, *Lessors;* BEAUSANG, *Lessee.*

issue of the marriage. In 1870 M and N made a lease of the lands for 200 years. The tenant served an originating notice under the Redemption of Rent (Ireland) Act, 1891, to redeem the rent, and for an advance under the Land Purchase Acts. M and N consented to the redemption, and an order for the same and for an advance was made accordingly. The trustees refused to assist in effecting the redemption, and M and N thereupon informed the tenant that they could not make title or carry out the order. The tenant thereupon applied to the Land Commission for an order for the specific performance by the lessors of the agreement contained in the consent. The leave of the Chancery Division, required by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7, for the exercise of the powers conferred by sect. 63 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), had not been obtained:—

Held, that the trustees were within their rights in declining to carry out the redemption, and that M and N had no power to compel them; that it was impossible for M and N to carry out the redemption; and that the tenant's application should be refused.

Semble, even if M had the power of sale conferred on a tenant for life by the Settled Land Act, it would not enable the redemption of the rent to be carried out.

Quære, whether the Land Commission has any jurisdiction to make an order for specific performance in proceedings under the Redemption of Rent (Ireland) Act, 1891.

APPEAL by the lessee on a question of law only from the order of Fitz Gerald, Q.C., Commissioner, dated the 23rd June, 1894, refusing the lessee's application for an order for the specific performance by the lessors of an agreement for the redemption of the rent of the holding under the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), and declaring that the lessors had caused unreasonable delay in the making of the redemption, and referring the originating notice to a Sub-Commission to fix a fair rent. The facts of the case are fully stated in the judgment.

D. B. Sullivan, Q.C. (with him *A. M. Sullivan*), for the appellant:—

The lessors not only consented to the redemption, but they appeared by counsel when the order for redemption was made, and there has been no appeal from that order. The trustees cannot refuse to carry out the redemption; there is an imperative trust to sell on the request of the tenants for life; the redemption of the rent is only a mode of sale, and the trustees can sell any

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interest forming portion of the fee. Here if the lessors had not consented to the redemption, the lessee could have had a fair rent fixed. It appears to have been largely assumed on the argument before Fitz Gerald, Q.C., Commissioner, that the lessee would not have been entitled to have a fair rent fixed, chiefly on the authority of *Barton* v. *Atkinson* (1), and *Moylan* v. *Finch* (2); but those cases do not apply to the present, which is governed by *Looby* v. *Finch* (3). The lessee is under the circumstances entitled *a fortiori* to enforce the agreement for redemption.

Moreover, the redemption could be carried out under the Settled Land Acts. The tenants for life have consented, and the trustees are trustees of the settlement, as defined by the Settled Land Act, 1882 (45 & 46 Vict. c. 38). See *In re Johnstone's Settlement* (4). The lessors need only serve notice on the trustees who would be bound thereby, and whose duty it would be merely to receive the purchase-money: *Duke of Marlborough* v. *Sartoris* (5); *Hatten* v. *Russell* (6); and the lessee need make no inquiries: *Mogridge* v. *Clapp* (7).

The lessors cannot rely on the point that the lease is defeasible; they are bound to carry out their contract. Moreover, the lease was made in lieu of the old tenancy, and if it is invalid, that tenancy is still subsisting.

Samuels, Q.C., and *Cherry*, for the lessors:—

The only contract here is for the redemption of the rent, not for sale of the fee, and the fee is not bound by the consent to the redemption given by the tenants for life. Moreover, the words in the first paragraph of section 1 of the Redemption of Rent (Ireland) Act, 1891, "subject as hereinafter mentioned," and the words "except as herein otherwise provided," in the second paragraph refer to the proviso in the third paragraph of the section, and this proviso gives to the lessee a particular right in case the lessor does not consent, or causes unreasonable delay, viz. a right to have a fair rent fixed. The lessee, therefore, has no other right

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(1) 30 L. R. Ir. 396.

(2) 28 L. R. Ir. 595.

(3) 30 L. R. Ir. 568.

(4) 17 L. R. Ir. 172.

(5) 32 Ch. Div. 616.

(6) 38 Ch. Div. 334.

(7) [1892] 3 Ch. 382.

Land Com. 1894.

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or remedy, and specific performance of the agreement for redemption cannot be ordered: *Berkeley* v. *Elderkin* (1); *The Dundalk Western Railway Co.* v. *Tapster* (2); *Vallance* v. *Falle* (3); Maxwell on Statutes (2nd edition), p. 495; *The Queen* v. *County Court Judge of Essex* (4). The present is an *a fortiori* case, for here not only is there a remedy provided, and by the same section which confers the right, but the words "subject as hereinafter mentioned," and "except as herein otherwise provided," practically in terms preclude any other remedy. Further, the Land Commission have but a limited statutory jurisdiction to order specific performance, which is not extended by the Act of 1891 to the present case. The case is one merely of unreasonable delay, for which the Act provides a remedy, or it is not within the Act at all. The lessors do not object to the portion of the order which sends the case to the Sub-Commission.

Further, the lease is void so far as it purports to extend beyond the lives of the lessors: see *Neale* v. *Mackenzie* (5), which shows how far the Court would go to compel specific performance in the case of a letting made by a tenant for life. This is not a case for specific performance. The lease was made, and the consent given under a mistake as to the powers of the lessors: see *Howel* v. *George* (6); *Harnett* v. *Yeilding* (7).

As to the Settled Land Acts, the contract here is not for a sale of land within those Acts. The definition of "land" in the Act of 1882 (sect. 2 (10)) does not include rent: "rent" is separately defined.

Moreover, in any application for specific performance of such an agreement as this the position of the Land Commission, who have to advance the purchase-money, must be considered. They must see that the security is good, and that the title is a proper one.

A. M. Sullivan, in reply:—

Rent is land within the meaning of the Settled Land Acts.

(1) 1 E. & B. 805.
(2) 1 Q. B. 667.
(3) 13 Q. B. Div. 109.
(4) 18 Q. B. Div. 704.
(5) 1 Keen, 474.
(6) 1 Mad. 1.
(7) 2 Sch. & Lef. 549.

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As to the meaning of "land" under those statutes, see *In re Earl of Aylesford's Settled Estates* (1), *Constable* v. *Constable* (2). Where there is power to bind the fee there is power to bind portion of the fee. Under the Redemption of Rent Act the consent has the same effect as the lodgment of an agreement to purchase under the Land Purchase Acts; the parties stand in the relation of vendor and purchaser, and section 22 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), applies.

Bewley, J.:—

Dec. 3.

This case came before me on an appeal by the lessee, from an order of Mr. Commissioner Fitz Gerald, dated the 23rd June, 1894, whereby he refused the application of the lessee for specific performance by the lessors of an agreement for the redemption of the rent to which the originating notice in this matter refers on the terms provided in the order of the Land Commission, dated the 13th June, 1893, and referred the case to a Sub-Commission to have a fair rent fixed.

The proceedings in this matter were instituted by Thomas Beausang, under the Redemption of Rent (Ireland), Act, 1891, by an originating notice, served on the 28th September, 1892, for the purpose of redeeming the yearly rent of £127 18*s*., now payable under an indenture of lease dated the 6th April, 1870, made by Nicholas Ffolliott Gyles, and Maria M'Guire Gyles, the lessors in this matter, to Thomas Beausang (therein called Thomas Boozan), for a term of 200 years, and for an advance to carry out such redemption; or, in case of the lessors not signifying their consent thereto in the prescribed manner, and within the prescribed time, to have a fair rent fixed.

On the 9th November, 1892, the necessary consent prescribed by the General Rules was signed by the lessors, and was duly lodged in the Land Commission on the 18th November, 1892, and on the 13th June, 1893, Mr. Commissioner Fitz Gerald made an order directing the redemption of the rent, and fixing the redemption price at the sum of £1800, guaranteed land stock.

No steps were subsequently taken by the lessors to proceed with the redemption, and, after a correspondence between the solicitors for the parties, extending over a considerable time (unnecessary to be referred to in detail), the solicitor for the lessors stated that his clients were not in a position to make title.

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(1) 32 Ch. Div. 162. (2) *Ibid.* 233.

A motion was then made on behalf of the lessee for specific performance of the agreement embodied in the consent of the 9th November, 1892, on the terms provided in the order of the 13th June, 1893, and on the hearing of this application the order of the 23rd June, 1894, now appealed from was made.

The holding out of which the rent the subject-matter of these proceedings issues, consists of part of the lands of Muckridge, in the county of Cork, and contained originally 52A. 1R. 2P. statute measure. By a proposal in writing, dated the 15th Nov., 1860, Thomas Beausang, the father of Thomas Beausang the lessee in this matter, proposed and agreed to take these lands from Arthur M'Guire Gyles (who appears to have been then the owner in fee), for the term of three lives and thirty-one years in reversion, or ninety-nine years from the 25th March, 1861, at the yearly rent of £131 15*s*., and this proposal was duly accepted. Arthur M'Guire Gyles afterwards died, leaving his widow Maria M'Guire Gyles (one of the lessors in this matter) surviving, who, under some title which has not been shown, seems to have become seized in fee of these lands, subject to Thomas Beausang's tenancy. The evidence tends to establish that in the month of November, 1863, she was only entitled to 32A. 1R. 6P. of these lands, and that her title to the residue accrued sometime between that date and the month of April, 1870.

In November, 1863, Maria M'Guire Gyles intermarried with Nicholas Ffolliott Gyles, one of the lessors in this matter, and prior to the solemnization of the marriage a settlement was made of certain real estates to which Mrs. Gyles was entitled, including 32A. 1R. 6P. of the lands of Muckridge. This settlement was carried out by two deeds of equal date, by one of which the estates were conveyed to trustees upon trust for sale, and by the other of which trusts were declared of the proceeds of such sale. The first mentioned deed was made between Maria M'Guire Gyles of the first part, Nicholas Ffolliott Gyles of the second part, and George Gyles and Richard Gyles of the third part, and by it the

32A. 1R. 6P. of the lands of Muckridge, and other hereditaments were conveyed to the parties thereto of the third part in fee simple, upon trust that they or the survivor of them, or the heirs of such survivor should, at the request in writing of Maria M'Guire Gyles, and Nicholas F. Gyles during their joint lives, and of the survivor during his or her life, and after the death of such survivor at the discretion of the trustees or trustee for the time being, sell the said premises or any part thereof, either together or in parcels, and either by public auction or private contract, and either with or without any special or other stipulations as to title, or evidence, or commencement of title or otherwise, and might buy in and rescind, or vary any contract for sale, and re-sell without being answerable for loss occasioned thereby, and might, for the purposes aforesaid, or any of them, execute and do all such assurances and things as they or he should think fit, and should stand possessed of the residue of the moneys which should arise from any such sale after payment of expenses upon such trusts as were declared by the indenture of equal date therewith. The deed contained a power enabling the trustees at any time before sale on the request in writing of Mr. and Mrs. Gyles, or the survivor of them, and afterwards at their discretion to demise any portion of the premises for any term not exceeding thirty-one years, to take effect in possession, or for building purposes for a term not exceeding ninety-nine years.

By an indenture dated also the 19th November, 1863, and made between Maria M'Guire Gyles of the first part, Nicholas Ffolliott Gyles of the second part, George Gyles and Richard Gyles of the third part, Ricarda Gyles of the fourth part, and Elizabeth Gyles of the fifth part, after reciting the last-mentioned indenture, and reciting that Maria M'Guire Gyles was indebted to Ricarda Gyles in the sum of £6486 11*s.* 6*d.*, and to Elizabeth Gyles in the sum of £1059 14*s.* 6*d.*, it was witnessed that from and after the solemnization of the said intended marriage, George Gyles and Richard Gyles, and the survivor of them, or the executors or administrators of such survivor, should with such consent, or at such discretion as therein mentioned, invest the residuary or net moneys to arise from the sale under the trusts for sale in the thereinbefore-recited indenture, upon such stocks, funds, shares, and securities as therein mentioned, and should stand possessed of the sum of £6486 11*s*. 6*d*., portion thereof upon trust for Ricarda Gyles, her executors, administrators, and assigns, and of the sum of £1059 14*s*. 6*d*., other portion thereof upon trust for Elizabeth Gyles, her executors, administrators, and assigns, and as to the residue of the said trust funds should, during the joint lives of Maria M'Guire Gyles, and Nicholas F. Gyles, pay the income thereof to Maria M'Guire Gyles for her separate use, without power of anticipation, and after the death of one of them, should pay the same to the survivor during his or her life, and after the death of such survivor should stand possessed of the said residuary or net moneys in trust for the issue of the said marriage as therein mentioned, and in default or failure of children upon such trusts as thereby declared. And it was agreed and declared that until the premises expressed to be granted by the indenture of equal date had been sold, the trustees should pay or apply the rents and profits of the same premises, or of the unsold portion thereof, after all outgoings to the person or persons for the purposes, and in the manner for or in which the income of the residuary or net moneys to arise from such sale, or the investments thereof would be payable or applicable. This indenture also contained a covenant that if Maria M'Guire Gyles then was, or if, during the intended coverture, she or Nicholas F. Gyles in her right, at one and the same time, and from one and the same source should become seized or possessed of, or entitled to any real or personal property of the value of £500, or upwards, for any estate or interest in possession, reversion, remainder, or expectancy, then Nicholas F. Gyles, and Maria M'Guire Gyles, and all other necessary parties should convey, assign, and assure the same to, or otherwise cause the same to be vested in, the said trustees or trustee, upon trust, with all convenient speed, and in such manner as he or they should think fit, to sell and convert into money such part as should not consist of money, or of any of the investments thereby authorised, and should stand possessed of the moneys to arise from such sale, calling in, and conversion, and of such parts of the said property as should consist of money, or of authorised investments upon the trusts thereinbefore declared concerning the said residuary or net moneys to arise from the sale of the said premises under the trust for sale in the said indenture of equal date.

Before the date of the lease next referred to, Mrs. Gyles had become entitled in fee-simple to the residue of the lands of Muckridge included in the holding in this case, and not comprised in the first-mentioned indenture of the 19th November, 1863, and whether her title had accrued prior to the date of that indenture or subsequently, this portion of the lands, by virtue of the covenant above referred to, was subject to the trusts of the second-mentioned indenture of that date.

By an indenture of lease dated the 6th April, 1870, made between Nicholas Ffolliott Gyles, and Maria M'Guire Gyles of the one part, and Thomas Beausang (therein called Thomas Boozan), father of Thomas Beausang the lessee in this case of the other part, after reciting *inter alia* the said accepted proposal of the 15th November, 1860, and the death of Arthur M'Guire Gyles, and the marriage of Nicholas F. Gyles, and Maria M'Guire Gyles, and erroneously reciting that all the estate and interest in the lands of Muckridge, of which Arthur M'Guire Gyles was in his lifetime seized and possessed, were then vested in Nicholas F. Gyles, and Maria M'Guire Gyles, and reciting that they had agreed to grant to Thomas Beausang in lieu and stead of the term of lives and years in the said proposal mentioned a lease of the said lands for the term of 200 years, at the yearly rent of £130 13*s*. 1*d*., the said Nicholas F. Gyles, and Maria M'Guire Gyles purported to demise to Thomas Beausang, his executors, administrators, and assigns, that part of the lands of Muckridge then in his possession, containing 52A. 1R. 2P. statute measure, for a term of 200 years, from the 25th March, 1868, at the yearly rent of £130 13*s*. 1*d*.

How this lease came to be executed it is not easy to understand. Mr. Gyles alleges that he and his wife were not aware that the term granted by the lease was in excess of the leasing power under their marriage settlement, and it is right to state that the solicitor by whom the lease was prepared, now deceased, appears to have been in ignorance of the existence of the settlement.

This lease is admittedly not warranted by any power, statutory or otherwise, exercisable by Mr. or Mrs. Gyles, and is not binding on the trustees of the settlement, nor on the inheritance in the lands. I assume, for the purposes of the present case, that it is binding on the lessors, although having regard to the nature of Mrs. Gyles' interest at the time it was executed there may be a serious question as to its validity as against her; but on the death of the survivor of Mr. and Mrs. Gyles the persons interested in the trust estate might repudiate the lease, and the lands demised might be sold discharged from the term.

Thomas Beausang, by whom the originating notice in this case was served, is the specific legatee of this leasehold interest under his father's will, and is also executor of that will. A small portion of the holding was taken under the provisions of the Labourers Acts, and the area has been thereby reduced to 50A. 2R. 1P., and the rent to £127 18*s.*

The trustees of Mr. and Mrs. Gyles' settlement have refused to assist in carrying out the redemption of the rent sought in this matter, and under these circumstances the question arises, can the contract contained in the consent for redemption given by Mr. and Mrs. Gyles be specifically enforced by this Court?

Mr. and Mrs. Gyles have expressed their willingness to withdraw this consent, and offer no objection to a fair rent being fixed; but in opposition to the application for specific performance their counsel submits:—1, that no order for specific performance can be made, having regard to the state of the title; and, 2, that the remedy by way of specific performance does not lie, inasmuch as the statute which gives the right of redeeming the rent provides that in the event of the lessor causing unreasonable delay to the making of the redemption, the redemption shall not be made, but the lessee can have a fair rent fixed.

Before dealing with these arguments it is desirable to point out what appears to be the object and scope of the Redemption of Rent Act. It is intituled an "Act for the Redemption of Rent by long Leaseholders and others," and by its first section it enables a leaseholder holding for a term excluded from sect. 1 of the Land Act of 1887, or a grantee under a fee-farm grant who respectively fulfil the conditions mentioned, to apply to the Land Commission to redeem his rent, and if the prescribed consent is given, the redemption is to be effected by payment of such capital sum as may be agreed upon, or as, in case of difference, may be determined by the Land Commission in like manner as if it were a head-rent redeemed under the provisions of sect. 16 of the Land Act of 1887.

The meaning of the redemption of a rent, a rent-charge, or an annuity, is well known to the law. It is the buying up and extinguishment of an annual sum either terminable or perpetual as the case may be.

The Redemption of Chief Rents Act of 1864 (27 & 28 Vict. c. 38) enabled the owner of lands held in fee-farm, or for certain long terms, to enter into agreements with the owner of the rent, and when in the limited class of cases to which this Act applied, the redemption was carried out by a certificate of the Judge of the Landed Estates Court, the effect of such certificate under sect. 5 was the same as if the rent had been conveyed to the owner of the land subject thereto by a Judge of the Landed Estates Court on a sale.

In like manner a lessee for a term of years applying to the Land Commission under the Redemption of Rent Act is not, so far as I can see, entitled to a conveyance in fee of his holding, but to an extinguishment of all rent during the residue of his term, with the protection from all superior rents, or rent-charges afforded by their redemption under the powers given by sect. 2 of the Redemption of Rent Act.

Thus in the present case Thomas Beausang (or Johanna Beausang, who is now his assignee) is entitled, if the redemption is carried out, not to have the existing term of 200 years enlarged, but to have the lands discharged from all rent during the residue of the term still to come.

At present that term is obviously determinable with the lives of Mr. and Mrs. Gyles, and if the term cannot be made binding on the inheritance, it is clear that even if such an interest comes within the provisions of the 1st section of the Redemption of Rent Act, specific performance of the consent to redeem on the terms of the order of the 13th June, 1893, could not be enforced, as the Land Commission would not make an advance on such security, *Land Com* 1894.

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where the amount of the advance would be payable by instalments extending over a period of forty-nine years.

It is contended, however, on the part of the appellant that Mr. and Mrs. Gyles can compel the trustees of their settlement in exercise of their trust for sale to carry out the redemption. In my opinion they cannot. Although the trust for sale in this case can only be exercised on the request in writing of Mr. and Mrs. Gyles during their joint lives, when that request is given, the mode of sale, the price to be paid, and the person to be accepted as purchaser are matters within the uncontrolled discretion of the trustees: *Thomas* v. *Dering* (1) appears a clear authority on this point. But this is not an ordinary sale. It is a case in which a lease having been made for a term wholly unwarranted by, and in excess of, any power, statutory or otherwise, Mr. and Mrs. Gyles call upon the trustees to validate the transaction, and for that purpose to grant a contingent reversionary term in the lands expectant on the deaths of Mr. and Mrs. Gyles, and in consideration of a sum of money, the estimated value of the rent payable under a valid lease, to extinguish the rent for the residue of the 200 years. I may add that as to the 20 acres of the lands not comprised in the conveyance in trust for sale of the 19th November, 1863, the trust for sale applicable under the covenant to settle after-acquired property in the deed of equal date appears to be exercisable by the trustees at their own discretion, without any request or consent on the part of Mr. or Mrs. Gyles, and it is difficult to see how they can claim as of right to have this portion sold to any particular person, or disposed of in any particular way. In my opinion the trustees of the settlement are within their rights in declining to carry out the redemption, and Mr. and Mrs. Gyles have no power to compel them. The Settled Land Acts do not, I think, assist the case of the appellant in any way. Mrs. Gyles appears to be a tenant for life of the settled land within the meaning of the Acts only by virtue of the 63rd section of the Settled Land Act, 1882, and any power of sale she possesses in respect of the settled land is conferred by that section; but by the 7th section of the Settled Land Act, 1884, the powers given by the

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(1) 1 Keen, 729.

63rd section of the Act of 1882, cannot now be exercised without the leave of the Court (*i. e.* the Chancery Division), and Mrs. Gyles has not obtained any such leave.

Even if Mrs. Gyles had the power of sale conferred on a tenant for life by the Settled Land Act, I am not at present prepared to hold that it would enable the redemption of the rent in this case to be carried out. It would be strange if the effect of this power were such that a tenant for life, possessing only limited powers of leasing under the Act, could make a lease for any term he thought fit, no matter how long, and give validity to the transaction by selling the rent to the lessee under the power of sale.

In the present case it appears impossible for Mr. and Mrs. Gyles to carry out the redemption, and this, in my opinion, disposes of the appeal. It is unnecessary, therefore, to consider the very important question as to whether this Court has any jurisdiction to make an order for specific performance in proceedings under the Redemption of Rent Act.

The appeal must be dismissed with costs.

Solicitor for the lessors: *William J. Verlin.*

Solicitor for the lessee: *Maurice Healy.*

D. M'C. M.

WRIGHT *v.* DAY AND OTHERS (1).

(1893. No. 5486.)

Q. B. Div.
1894.
Oct. 29, 30.

Contract—Trustees—Exclusion of personal liability—Salary of chaplain of trustee church.

The defendants were trustees of a chapel under a trust deed, which authorized them from time to time to appoint a chaplain and to fix his salary, and to pay such salary out of certain funds vested in them, and out of pew-rents and collections. In 1885 the defendants held a meeting, and by resolution fixed the chaplain's salary at £250 per annum, payable out of the trust funds.

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(1) Before HARRISON, HOLMES, and MADDEN, JJ.

and appointed the plaintiff to be chaplain. By the direction of the trustees one of their number then wrote to the plaintiff, stating that he had been elected at the stipend of £250. The defendants subsequently formally nominated the plaintiff to the Archbishop for induction. The instrument of nomination recited the plaintiff's appointment at £250 per annum, chargeable on the income of the trust fund provided that the funds reached said amount. The plaintiff acted as chaplain until 1891, when he resigned. At this date, owing to the falling off of income, a considerable arrear of salary remained still unpaid. For this arrear the plaintiff sued the defendants as upon a personal contract:—

Held, that the plaintiff must fail, there being no evidence to show that any relation of employer and employed existed between the plaintiff and the defendants, or that there was any special contract under which the defendants became personally liable for the plaintiff's salary.

NEW TRIAL MOTION.

The action, which was tried before Gibson, J., and a special jury on the 16th May, 1894, was brought by the plaintiff, the Rev. Charles H. H. Wright, D.D., against the defendants (the Bishops of Cashel and Ossory, and Canon Wynne), as trustees of the Bethesda chapel, Dublin, for arrears of salary as chaplain of the Bethesda Chapel under an alleged personal contract. The facts were these:—

By lease and release, dated, respectively, the 9th and 10th March, 1794, William Smyth granted to certain trustees therein named the building called the Bethesda Chapel and two houses adjoining same, and the plot of ground whereon they stood, to hold the same unto the said trustees and their heirs for ever upon trust to permit the said William Smyth and his wife and the survivor of them during their lives to occupy and enjoy one of the said houses, and out of the other of said houses to raise and pay to said William Smyth the sum of £250 with interest, and subject thereto upon trust that the said trustees and their successors should diipose of and apply such rents, profits, produce, and income of the same so received, and likewise all and every such charitable and benevolent collections and subscriptions or profits arising by setting the seats as might or should be received in or upon account of the said chapel or donations thereto, in and towards payment in the first place of all taxes imposed or to be imposed upon the premises, and in and towards the necessary repairs and support of the same, and in the next place in and towards the salary or allowance or salaries or allowances, at the discretion and by the appointment of them, the trustees for the time being, of, for, or unto the minister or ministers officiating in the said chapel and performing divine service therein, and unto and for the organist, clerk, and other necessary and proper officers and servants in and about the said chapel, and in and for the necessary repairs and preservation of the organ, seats, galleries, and other interior parts of said chapel, and the necessary renewal or alteration of the communion plate thereof, and after such outlay should dispose of and apply all and every part of the residue or surplus of the said rents, issues, profits, and income in and towards the maintenance and support of 'The Lock Penitentiary,' and in case of its removal or discontinuance, of the Female Orphan Asylum. There were also powers given to appoint new trustees, and to set pews in the chapel; and certain duties were imposed on the minister or ministers who should thereafter be nominated to perform divine service in the said chapel in regard to the adjoining Female Orphan Asylum; and provision was made that a charity sermon should be preached in the said chapel once a-year in aid of the said asylum by a clergyman to be approved of by the governors of that institution.

By deed dated 10th April, 1825, reciting the foregoing (certain omissions in which this document was, it would appear, intended to supply), it was declared by the then trustees that the grant of the said chapel, houses, and premises so vested in them should for ever remain to the uses therein declared; and it was by them covenanted and declared, with the then Archbishop of Dublin, that any person who should be elected a trustee should be a priest in Holy Orders of the United Churches of England and Ireland, and that the services to be performed in said chapel should be according to the rites of said Churches, and that the trustees should nominate unto the said Archbishop and his successors a fit person to be licensed as a minister of the said chapel to perform the services therein at a sufficient salary, and should pay such minister out of the funds vested in them as such trustees the salary at which he should be so nominated; and it was further declared that the trustees should, out of the said funds, maintain the said chapel and the organ and furniture thereof, and provide all things necessary for the due performance of divine service therein, and that in case any minister or trustee appointed under the trust should separate himself or dissent from the said United Churches, or decline to perform the said services, then they or he should cease to be a minister or trustee, and that the remaining trustees should select a person in the place of the person so offending.

In accordance with the above provisions, chaplains were appointed by the trustees from time to time, the general management and finances of the chapel being placed in the hands of a committee of management.

On the 15th May, 1885, the then chaplain, the Rev. Dr. A. W. Leet having resigned, the trustees for the time being, namely, the three defendants, and two others since deceased—the Ven. L. H. Streane, Archdeacon of Glendalough, and Francis Meade, Q.C.—held a meeting, the minutes of which, so far as here material, were as follows:—"The Rev. A. W. Leet, D.D., who has recently been appointed to the chaplaincy of Baggot Rath, sent in his resignation of the chaplaincy of Bethesda, which was accordingly received. Resolved, that the income of the chaplain shall be £250 a-year, payable out of the interest of the endowment and the pew rents and collections, subject to such alterations as the trustees approve of. After a consideration of a number of applicants, it was resolved that the Rev. Charles H. H. Wright, D.D., incumbent of St. Mary's, Belfast, be appointed to the vacant chaplaincy."

The Rev. L. H. Streane was directed to communicate the election to the plaintiff, and wrote to him the following letter:—

THE RECTORY, DELGANY,
15th May, 1885.
ATHENÆUM CLUB, DUBLIN.

MY DEAR DR. WRIGHT,—I have been requested by the Bethesda trustees to write to you saying that you have been this day elected to the chaplaincy of Bethesda at the stipend of £250, which possibly may be increased should the funds admit at the discretion of the trustees.

I am further requested to state that under the terms of the trust deed the Governors of the Orphanage have the right of claiming a charity sermon once in each year on behalf of the funds of the Orphanage, with the further right of selecting the preacher on that occasion.

I feel it right to add that it is of the greatest importance that you should commence the services there in person as soon as possible, as the registrar informed me this day that the congregation is already showing symptoms of suffering from the state of suspense. . . .

Yours very faithfully,

L. H. Streane.

The plaintiff subsequently obtained from the honorary secretary of the committee of management an instrument of nomination, which he, by the direction of the Archbishop of Dublin, took to the trustees for their signature and then brought to the Archbishop, who thereupon instituted him in the chaplaincy.

This instrument of nomination, dated the 11th July, 1885, and executed by the five trustees, recited the vacancy, recited that the right of appointment to the chaplaincy was vested in the said five trustees under and by virtue of the original deed of trust relating to said chapel, bearing date the 10th March, 1794, and also one other deed or declaration of trust, bearing date the 10th April, 1825, and witnessed that the said trustees did thereby nominate and appoint the Rev. Charles Henry Hamilton Wright, D.D., being a priest in holy orders of the Church of Ireland to be chaplain of said Chapel of Bethesda, "appointing him the said Charles Henry Hamilton Wright as long as he shall continue as such chaplain at a salary of £250 a-year chargeable upon the pew-rents in said chapel, and upon the £60 a-year which is chargeable upon the funds of the Representative Body of the Church of Ireland, provided that the united sums shall reach to that amount, and which pew rents are now vested in us as such trustees as aforesaid"; and presenting the said Charles Henry Hamilton Wright to the Archbishop of Dublin "to be by him duly admitted and licensed as a chaplain of said chapel . . . so long nevertheless only as he should not separate himself from the said Church of Ireland, nor perform the services in said chapel contrary to the forms of said Church, or discontinue to be a regular clergyman of the said Church of Ireland, in any of which events he shall cease to be incumbent or chaplain of said chapel."

In pursuance of this nomination the plaintiff was instituted as incumbent of the Bethesda Chapel by the Archbishop, and entered upon his duties. He received his full salary up to the end of the year 1887, but during the following years there was a considerable falling off of income, and in June, 1891, when the plaintiff resigned the chaplaincy there remained unpaid the sum of £391 8*s.* 3*d.*, in respect of the plaintiff's salary, of which a sum of £39 11*s.* 5*d.* was subsequently received by him.

The present action was instituted by the plaintiff to recover £351 16*s.* 10*d.*, balance of arrears of salary, the plaintiff in his statement of claim alleging that in or about the month of May, 1885, the defendants, as trustees of a certain indenture dated the 10th March, 1794, appointed the plaintiff chaplain of the Bethesda Church, Dublin, at a salary of £250 per annum, which salary the defendants promised and agreed to pay to the plaintiff in consideration of his performing certain duties in connexion with said church, so long as the plaintiff should continue to be such chaplain as aforesaid. The defendants pleaded that the plaintiff's appointment was made by the nomination deed of the 11th July, 1885, and under the trust deed of the 10th March, 1794, and at a salary of £250, chargeable upon the above-mentioned funds, and that before action brought all the sums accruing from these funds, whilst the plaintiff continued as such chaplain, were paid to and received by the plaintiff in respect of said salary, and that his claims were so discharged and satisfied, and that there was no agreement, express or implied, by the defendants or any of them, to pay to the plaintiff any further or other sums whatever in respect of salary; and alternatively pleaded a special contract that the plaintiff was appointed on the terms that his salary should be payable solely out of and in no event should exceed the income accruing from said funds whilst the plaintiff continued as such chaplain. The plaintiff in his reply pleaded that he was a stranger to and not bound by the instrument of nomination.

In his report of the trial the learned Judge stated that the plaintiff's case was presented as one of personal contract founded on the letter of the 15th May, 1885, it being contended that the plaintiff was not bound by the deed of nomination. It was sought by counsel for the plaintiff to open the question whether the falling off of pew-rents, &c., was owing to the incompetence or maladministration of the committee of the church who, with the assent of the trustees, had the control of financial affairs; but the learned Judge ruled that on the pleadings the case was one of contract imposing personal liability irrespective of the sufficiency or insufficiency of the church funds, and refused to permit the action to be turned into a suit for breach of trust and default, which would raise a wholly new issue. The plaintiff was examined and stated (*inter alia*) that he was not aware of the contents of the trust deed, but believed that there was one; he knew of the nomination, but did not sign it; he could not say he did not read it; (on cross-examination) he took the nomination paper to Archdeacon Streane by direction of the Archbishop, and then to Canon Wynne; he got it from Spencer (the secretary of the committee of management) on that same day; he brought it back to the Archbishop, who sent the induction afterwards. The words Henry Hamilton (part of plaintiff's name) in the nomination were in his writing; he knew there was an endowment, probably amounting to £60; knew the place was worth £250; and knew the church was a trustee church, entirely supported by pew-rents and endowment, and that the income of the church must depend to a certain extent on the success of the clergyman; he was confident he would keep up both pew-rents and collections; he did not expect the trustees would pay out of their own pockets, but thought they guaranteed salary till they might reduce it after notice at end of any year; they had no power of dismissing him; they had power to cut down the salary; the salary was subject to the arrangements of the trustees and alterations; he considered the trustees were acting through the committee; he never required the trustees to pay personally; he believed under the trust deed he must be paid ultimately; the pew-rents and collections did fall off tremendously; they did not amount to one-third what they were; it was not his fault; he first saw the resolution of the 15th May, 1885, about two years after his appointment.

Counsel for the defendants asked for a direction, but the learned Judge thought it best to take the opinion of the jury on the entire case so as to preclude further litigation. The defendants were then examined. The Bishop of Ossory, Dr. Walsh, stated that at the meeting of the 15th May, 1885, Dr. Day requested Archdeacon Streane "to communicate the election to

Dr. Wright"; and that he gave Archdeacon Streane no authority to bind him and the other trustees personally. (This evidence was objected to by counsel for the plaintiff.)

At the close of the evidence counsel for the defendants renewed their application for a direction. The learned Judge, however, considered it best to take the opinion of the jury, and left to them the following question :—"Was the plaintiff employed on the terms that the defendants should be personally responsible for the plaintiff's salary ?" but did not direct as to whether the contract was in any particular document. After a short interval the jury returned and asked for "the contract," which they explained as meaning the resolution of May, 1885, and the nomination. The jury having again retired the learned Judge at the request of counsel for the plaintiff sent Dr. Streane's letter to the jury, who ultimately answered the question submitted to them in the affirmative. In his report the Judge stated that he did this, as, in his opinion, it was the basis of any case the plaintiff might have; and added that he had great difficulty in seeing that Dr. Streane had any authority (nor was that likely) to vary the terms of the trustees' resolution; that if it was not a contract or evidence of a contract binding the trustees, it largely affected the verdict; that he was inclined to direct for the defendants, but considered it better to take the opinion of the jury; and that in directing judgment, he was not to be taken as indicating any view in favour of the plaintiff's case.

The defendants now applied to change the verdict and judgment, or for a new trial.

Matheson, Q.C. (*Meredith, Q.C.*, and *Hunt*, with him), for the defendants :—

The plaintiff held his office expressly under the trust deeds; and his salary was payable solely out of the funds provided thereby. Of this he had the fullest notice; the deed of nomination refers to the trust, and the plaintiff admits that he knew that the defendants were trustees. He was only entitled to be paid the salary fixed by the trustees so far as there were funds available for the purpose, and no priority is given to his salary over other outgoings. The defendants were not his employers in the ordinary sense, nor was there any relation of master and servant between them. They possessed a power to appoint a chaplain; they appointed the plaintiff and fixed his salary in the way provided for by the trust deeds, at the sum which they thought the income arising from the trust fund, pew-rents, and collections would be sufficient to cover. Thereupon the plaintiff became a *cestui que trust* under these deeds; and the only duty remaining to be performed by the defendants was to see that the funds were properly applied. But there is here no allegation of breach of trust or mismanagement, or of the existence in the hands of the defendants of any moneys applicable to payment of the plaintiff's salary. The plaintiff's claim is solely on a contract between employer and employed, and such a case as this is without precedent. Trustees may be held liable in a common law action for money received for the plaintiff's use, but there is no remedy against trustees at common law upon contract. If the plaintiff wishes to allege maladministration of the trust he should apply to the Chancery Division. The adequacy of the fund depended mainly upon the plaintiff's success in his office, and it would be absurd to suggest that the defendants were to pay the yearly salary of £250 whether the plaintiff allowed the pew-rents and collections to fall off or not. Archdeacon Streane's letter could not contain a contract; it was merely an intimation of something that had taken place. The plaintiff's right to the office depended altogether upon the deed of nomination, and could only be enforceable upon the consent of the Archbishop to his induction. [Counsel referred to *Davies* v. *Ridge* (1).]

The Solicitor-General (*Hemphill, Q. C.*) and *Serjeant Dodd* (with them *Cherry*), for the plaintiff:—

There was a special personal contract between the plaintiff and the defendants. The existence of a trust fund could not prevent, and did not, in fact, prevent the trustees from making themselves liable personally. Besides, the defendants, as we allege, never looked after the collections or saw that they were applied in the proper manner. [HOLMES, J.: How can that affect the question in the present case?]

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(1) 3 Esp. 101.

Trustees may make themselves personally responsible: see *Coutts & Co.* v. *Irish Exhibition and Others* (1); *Collingridge* v. *Gladstone* (2); *Longman* v. *Hill* (3); *Sugg* v. *Hill* (4); or an agent, *Kelner* v. *Baxter* (5). Overseers of the poor have been held liable personally for contracts entered into for the relief of the poor: *Kirby* v. *Banister* (6); *Lambert* v. *Knott* (7); and so, too, trustees of a turnpike road have been held personally liable for contracts in connexion with the trust: *Parrot* v. *Eyre* (8).

If this was a proprietory church it would not be possible to suggest the existence of any relation of trustee and *cestui que trust* between the parties; they would simply be employer and employed. So, too, if, in the case of a church not possessed of any trust fund, the persons owning or using the church require a clergyman and appoint one to perform certain duties, and promise him a fixed salary, this is a personal contract. This is in law merely a proprietory church. The organ-blower would sue the defendants for his wages in contract; so would the organist; and so, we submit, could the chaplain. The resolution, the letter of Archdeacon Streane, the fact that the yearly accounts (in evidence) bring forward each year " arrears of salary " due to the plaintiff, furnished sufficient evidence of personal liability to go to the jury, and the verdict should not be disturbed.

Meredith, Q.C., for the defendants, was not called on to reply.

HARRISON, J.:—

[Having stated the facts, continued—]

Strong reliance has been placed upon the letter of Archdeacon Streane, but that letter was, in my opinion, merely a report referring to the resolution of the trustees and apprising Dr. Wright that he had been appointed to the vacancy; and it distinctly informed him that his appointment was under the trust deed, in which no priority is given to the payment of the Chaplain's salary.

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(1) 7 *Times*' Rep. 6, 313.
(2) *Ibid.* 60.
(3) *Ibid.* 639.
(4) 10 *Times*' Rep. 126, 288.
(5) L. R. 2 C. P. 174.
(6) 5 B. & Ad. 1069.
(7) 6 Dow. & Ryl. 122.
(8) 10 Bing. 283.

The trust was managed by a body of trustees, the present trustees, the three defendants, being eminent members of the Church of Ireland. There were two others acting with them in 1885—the late Archdeacon of Glendalough (the Ven. L. H. Streane) and Mr. Francis Meade. The way in which these gentlemen managed the property was the only reasonable one which they could adopt, namely through a committee of management. The endowment, according to the plaintiff, amounted probably to £60 a-year, being the profit rents out of houses mentioned in the trust deed. The accounts show that this money was applied by the trustees in the way they thought right. This action however is not brought to impeach the application by them of the trust funds. It is an action of a quite distinct nature, solely conversant with the liability, the personal liability, of these trustees to pay a particular sum. There is no suggestion of any misapplication, nor was there any misapplication, of the funds, and, if there had been funds coming in, no doubt Dr. Wright would have received his salary. He was an able man; he had able counsel; we may assume that he would have been active in supporting his own rights had there been any mismanagement. Well, the proceeds of the pew-rents and collections fell off, as Dr. Wright says, "tremendously" after his appointment. The fact is that the collections fell off, and that the funds available—from house rents, from the meagre contributions, and from pew rents—were so far insufficient that it was no longer possible to have the charity sermons for which the deed of trust had made provision. This is only an index of the condition of the Church. Dr. Wright received certain sums on account of his stipend; but eventually left, leaving a balance due to him; and he now sues these trustees personally for the amount of this balance. The Solicitor-General cites a number of cases to show that it is not because a man is a trustee, or that it is a public trust, that he is not to be chargeable personally. But no question for a jury arises from the facts as here established. The plaintiff states that he thought not that the trustees were liable, but that they guaranteed him his salary, and that he would be paid ultimately, that is out of the income of subsequent years. Advised perhaps in an evil hour, or perhaps dreaming that these reverend and respectable gentlemen were personally liable to him, the plaintiff has instituted the present action, for which there is not in my opinion, any shadow of foundation, and judgment must therefore be entered for the defendants.

HOLMES, J.:—

I agree that judgment must be entered for the defendants, and my decision is founded upon two propositions. First, there is no evidence showing that the relation of employer and employed existed between the plaintiff and the defendants. Secondly, there is no evidence to show that there was any special contract by which the defendants became personally liable for the plaintiff's salary.

If the relation of employer and employed existed between the parties, I should hold that *prima facie* the defendants would be liable for the plaintiff's remuneration, even although there was no express stipulation to this effect; but if this relationship did not exist, the plaintiff could only recover by showing an express personal agreement by the defendants.

Now there can be no doubt that the defendants acted as trustees; and it is admitted that the plaintiff was aware that they were acting in this capacity. Therefore the first thing we have to do is to see what was the instrument of trust, and what were the powers which it conferred. Turning to the deeds of 1794 and 1825, I find that the trustees possess the power, when a vacancy occurs in the church, to nominate a person as minister to the Archbishop at a fixed salary, and if he be appointed they are empowered to pay him his salary in the way and out of the funds mentioned in the deeds. These provisions are, in my opinion, inconsistent with the position of employer and employed.

The trustees are empowered to nominate a person to the Archbishop; the Archbishop instals him as chaplain, and then, under the terms of the deed, he becomes and remains chaplain until one of the contingencies contemplated by the trusts as creating a vacancy occurs, the trustees in the meantime having no power to remove him.

Reading these instruments I can come to no other conclusion than that the trustees had merely the power to nominate a chaplain to the Archbishop, and to fix the amount of his salary to be paid out of the trust funds; and it cannot be assumed from the mere fact of nomination that they undertook to pay the salary out of their own moneys. It therefore rests upon the plaintiff to show a contract by which persons not his employers had undertaken to pay him. So far from his being able to do this, all the documents are the other way. I should even go so far as to say that they show clearly that the trustees were not to be personally liable. I base this opinion upon the instrument of nomination which was handed over to the plaintiff, who, after correcting some of its language, handed it to the Archbishop. Hé was inducted in pursuance of that document, and what is contained in it? It declares that he shall be paid the salary mentioned, "£250 a-year, chargeable upon the pew-rents of the chapel, and upon £60 a-year payable by the Representative Body of the Church of Ireland, provided that the united sums shall reach to that amount"—in other words, so far as trust funds shall be available for the purpose. Under these circumstances I think that there was no question to be submitted to the jury, and that a verdict ought to have been directed for the defendants.

Madden, J.:—

I concur. In my judgment all the evidence, documentary and oral, points to the same conclusion, namely, that the relations of the defendants and the plaintiff are defined by the trust deeds of 1794 and 1825. The plaintiff's title to the office which he held depends upon these deeds and upon the instrument nominating him to the Archbishop. Upon the construction of these documents, it was not, nor could it be, contended that the plaintiff was entitled to the salary of £250 per annum if the funds proved insufficient. It is, however, suggested that there was evidence of a special contract between the defendants and the plaintiff sufficient to support the finding of the jury. We have been told that the jury were led to the conclusion at which they arrived, mainly by having before them the letter written by Archdeacon Streane. I have read that letter, and I regard it as merely a report or announcement of what happened at the meeting of trustees, and not as constituting or as evidencing an independent contract. Taking, however, that letter in the first instance by itself, it contains upon its face two statements indicating the true relations between the trustees and their chaplain. First, the trust funds are referred to as supplying the means of paying his stipend, and secondly, the letter contains an express reference to the trust deed. Thus, the only document which has been relied upon as evidence of a special contract negatives the existence of any agreement outside the deed of trust, inasmuch as it refers to this deed and to the funds thereby provided. The letter must be read in connexion with the deeds of trust and the instrument of nomination, which show distinctly and clearly that the stipend was to be paid out of certain specified funds, so far as these funds were available for the purpose.

Solicitors for the plaintiff: *L'Estrange & Brett.*
Solicitors for the defendants: *Sutton & Co.*

A. E. R. J.

Q. B. Div.
1895.
Jan. 20.

REG. (CALLAGHAN) *v.* RECORDER AND JUSTICES OF CORK (1).

Licensing Sessions—Jurisdiction of Court to alter a decision arrived at on preceding day—Rectification of error—Continuity of session.

At the Licensing Sessions held at Midleton on October 31st, and November 1st, 1894, an application was made for a spirit license. A preliminary objection to the sufficiency of the notice of application was argued before the Recorder (sitting as chairman) and twenty-three Justices, and decided against the applicant, and the word "rejected" was entered in the book by the Clerk of the Peace. After the hearing and decision of other cases the Recorder—some of the Justices having left the Bench—announced that the Court required the preliminary objection to be re-argued on the following day.

Next morning, November 1st, notwithstanding protest, the case was reopened, the preliminary objection re-argued, the ruling of the preceding day rescinded, and an order made, after examination of witnesses, granting the license to the applicant. On motion to make absolute an order for a writ of *certiorari* to bring up and quash the order of the 1st November:—

Held, that the motion should be refused.

Per Johnson, J.: The Court of Annual Licensing Sessions during its

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(1) Before JOHNSON, HOLMES, GIBSON, and MADDEN, JJ.

sitting has the same jurisdiction as the Court of Quarter Sessions during its sitting to alter its own judgment or order; and the continuity of the Session is not interrupted by the absence or presence of individual Justices other than the statutory Chairman.

MOTION to make absolute a conditional order, dated the 12th December, 1894, to the Recorder and Justices of the county of Cork, to bring up and quash certain orders made at Midleton Quarter Sessions on the 31st October, and 1st November, 1894, granting an application for a beer and spirit license, on the ground that the Recorder and Justices having heard and determined the matter of the application by the refusal of the certificate sought, it was not within their jurisdiction to rehear or re-open the application, and on the further ground that the applicant had neither the possession, nor a right to the possession, of the premises in respect of which the license was sought to be obtained.

The facts sufficiently appear in the judgment of Johnson, J.

Matthew J. Bourke, Q.C., and *R. A. Powell*, in support of the motion :—

The Recorder and two magistrates had no jurisdiction on the 1st November, to reverse or review the decision deliberately given on the previous day by the Recorder and twenty-three magistrates. Once a decision is pronounced in Court by a Court of Quarter Sessions, and duly recorded, there is no power in that Court to recall or reverse or review it. Such powers can only exist by being expressly conferred by statute. The only power that that Court has over its records is a power during the same sessions to amend clerical or ministerial errors. It would be an anomalous jurisdiction if a Court like that of Quarter Sessions, comprising several members and changing in its *personnel* from day to day and from hour to hour, were empowered at any time during the sessions to reverse its decision of a previous day, given and recorded when the Court was constituted of wholly different members : *Smith* v. *M'Glone* (1), *Reg.* (*Sullivan*) v. *Justices of Cork* (2), *Jones* v. *Jones* (3), *Rex* v. *Justices of Leicestershire* (4). The statute under which the application was made (3 & 4 Wm. 4, sections 3, 4, and 5), prescribes that the application shall, on the day it is called on, or at some other convenient time to be appointed, be adjudicated upon. This shows that the legal fiction as to the whole sessions being only one day has no application to Licensing Sessions. [The other ground of objection was abandoned in the course of the argument.]

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(1) 8 L. R. Ir. 267.
(2) 18 L. R. Ir. 99.
(3) 5 Dowl. & L. 628.
(4) 1 M. & S. 442.

Ronan, Q.C. (*Redmond Barry* with him), contra :—

The Court of Quarter Sessions can alter its decision at the same Session : *Inhabitants of Cockfield* v. *Boxstead* (1), where the ground of decision was that the alteration was not made at the same sessions. The headnotes in *Jones* v. *Jones* (2) and *Rex* v. *Justices of Leicestershire* (3) are against the contention of the other side. "The Session" is in law one day, and the magistrates can amend their orders at any time during its continuance : *Parish of St. Andrews Holborn* v. *St. Clement Danes* (4) (and see judgment of Holt, C.J., in that case) ; Dickinson on Quarter Sessions, 742. The law is the same in Ireland : 2 Hayes' Criminal Law, 730. The Court is like a Corporation. It was never said that if justices came into Court during the hearing of a case, they could not take part in the adjudication. There is no authority for the proposition that the Court will inquire as to what was the exact number of justices present at a particular moment. It is the tribunal, and not the individual members composing it, which must not undergo change. The Court will not presume that all the justices before whom the hearing took place were present at the judgment. Even if two justices grant an application which twenty have refused, they would be acting within their jurisdiction, though possibly exceeding the limits of good conduct : *King* v. *James* (5) and judgment of Lord Ellenborough therein. As to the difference between Petty Sessions and Quarter Sessions in this respect, see reports of cases under the Criminal Law and Procedure (Ireland) Act, 1887, pp. 118, 146, and 147. The so-called decision of the Court in this case only amounted to this, that the application was not properly before the Court. The course pursued may have been an inconvenient one, but the inconvenience would be much greater if a slip were made, and a decision recorded which could not be rectified.

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(1) 2 Salk. 477.
(2) 5 Dowl. & L. 628
(3) 1 M. & S. 442.
(4) 2 Salk. 606.
(5) 2 M. & S. 321.

R. A. Powell, in reply.

JOHNSON, J. :—

This is a motion to make absolute a conditional order for a writ of *certiorari* to revoke and quash an order of the Annual Licensing Sessions granting to J. O'Sullivan, the general manager of the Cork and Passage Railway Co. a certificate for a license to sell beer, wine, and spirits in the Company's premises at Aghada, county Cork, on the ground, stated briefly, that the Court had determined the application by refusing the certificate, and had no jurisdiction to re-open or grant the application.

At the Licensing Sessions when O'Sullivan's application was called on in its order (3 & 4 Wm. 4, c. 68, s. 3), counsel for the prosecutor O'Callaghan, a licensed vintner and inhabitant of the parish, took a preliminary objection to the application being entertained on the ground that the notice of application did not conform to the statutory requirements (3 & 4 Wm. 4, c. 68, s. 2). The Court then yielded to the objection, and the Clerk of the Peace wrote "rejected" across the entry of the application in his book. In about an hour or half an hour afterwards, on the same day and while the Licensing Sessions were still continuing, the learned Recorder of Cork (Chairman by Statute of the Quarter Sessions, 14 & 15 Vict. c. 57, s. 2), in open Court, in the presence of O'Sullivan's solicitor and O'Callaghan's counsel, announced that the Court would require the preliminary objection to be re-argued on the following morning. Accordingly the solicitor for O'Sullivan and counsel for O'Callaghan attended the Licensing Sessions on the following morning, and O'Callaghan's counsel having protested against the matter being re-opened, proceeded to re-argue the preliminary objection. After hearing the re-argument, the Court held that the notice of application complied with the statute, and then heard the application on the merits and granted it. In this state of things it is now contended that the Recorder and Justices acted without jurisdiction, because the individual Justices who were present when the preliminary objection was heard at first were not all present when the announcement was made by the Recorder that the objection should be re-argued on the following morning, nor when the re-argument took place and the application was heard and granted, and next because the application having been "rejected" when called on in its order, was then determined once for all, and could not be again entertained. The affidavits leave the allegations of fact as to the constitution of the Court in an unsatisfactory condition. The affidavit of Fitzgerald, filed on behalf of the prosecutor, states that a large number of the Justices present at the hearing of the application had left before the Recorder announced that he would require further argument on the matter of the sufficiency of the notice, and that on the following morning only three of the Justices who heard the application were present with the Recorder at the re-argument. On the other hand, O'Sullivan and his solicitor, in their respective affidavits, state on their belief that all the Justices present when the first ruling was made were present when the announcement was made by the Recorder that the objection should be re-argued next morning. If the constitution of the Court did not change *cadit quæstio*, and if the prosecutor considered it material to prove that it did change, there was a simple way of proving it by naming the Justices present on each occasion. We are therefore not satisfactorily informed whether the constitution of the Court did in fact change. Speaking for myself, I do not think it material (there being no imputation of misconduct), whether it changed or not, but I prefer to decide this motion on the assumption on which it has been argued, viz., that all the same Justices were not present with the Recorder (who continued to sit) on each occasion. It seems to me that the Legislature, when by the Act of 1874, s. 12, it provided for the establishment of Annual Licensing Quarter Sessions, adopted for that purpose the existing Court of Quarter Sessions, and conferred on that Court the jurisdiction under the Licensing Code. The first thing therefore is to consider what then was and still is the jurisdiction and practice of the Court of Quarter Sessions. The authorities cited by Mr. Ronan, and referred to in Dickinson's Q. S., 6th ed., pp. 74, 654, and 5 Burns' Just., 3rd ed., p. 374, establish that the Court of Quarter Sessions has jurisdiction at any time during the continuance of the Session to alter its judgment or order, and we have not been referred to any decision qualifying or reversing those authorities, which therefore are law at the present time. In my opinion then the Licensing Quarter Sessions during its continuance had jurisdiction to rectify any error which it might consider it had made during the session in any decision, and consequently to re-consider its ruling on this preliminary objection, and then to entertain and decide O'Sullivan's application on the merits. There is no suggestion of surprise. The Recorder announced in open Court, while the Licensing Sessions were sitting, and in presence of the applicant's solicitor and the objector's counsel, that the preliminary point should be re-argued next morning. At the time appointed, the Licensing Sessions still sitting, the applicant by his solicitor, and the objector by his counsel, appeared before the Court and re-argued the point. The Court heard the re-argument, and then ruled against the objection, and heard and determined the application on its merits. The Recorder (who was the Statutable Chairman) remained during the session, and in my opinion it was not material that individual Justices (members of the Court) may have changed from time to time because the continuity of the session was not thereby interrupted. This being so, the conditional order for a writ of *certiorari* ought to be discharged.

Holmes, J.:—

I concur. It is not suggested in any of the affidavits that have been filed that there was any misconduct or impropriety in recalling the first order, and that gets rid of one of the difficulties which have been suggested in the course of the case. If it were a case in which after, say, twenty Justices had come to a particular conclusion the bulk of them left, and two or three, remaining behind, altered the previous finding, it would in that case be impossible to hold that these gentlemen had not been guilty of misconduct or impropriety.

Gibson, J., concurred.

Q. B. Div
1895.

THE QUEEN
v.
JUSTICES OF
CORK.

MADDEN, J.:—

In concurring in the decision of the Court, I wish to make it clear that I express no opinion upon an important question which has been argued in this case, but which does not appear to call for decision, that is, whether an adjudication under the 4th section of 3 & 4 Wm. 4, c. 68, upon an objection formally brought before the licensing sessions, can be subsequently set aside, and an inconsistent decision come to, at the same sessions. The order or ruling which was cancelled in the present case was not an adjudication upon the hearing of an objection under the section to which I have referred. It was a ruling upon a preliminary point raised as to the sufficiency of the notice served by the applicant. It amounted to a decision that there was no application before the sessions upon which they could adjudicate. I see no reason why the principle of the authorities cited by Mr. Ronan should not extend to an order of this kind. It is altogether a different question whether the general rule which they establish can be applied to an adjudication upon an objection under sect. 4, having regard to the provisions of that and the preceding section, which (it is contended) provide for a final decision upon each objection formally brought before the sessions, at a definite point of time. I should not like to express an opinion upon this point without further consideration, and it is unnecessary to do so, inasmuch as (whatever be the effect of these sections) I see nothing in the Licensing Acts to limit or control the ordinary powers of a Court of Quarter Sessions in dealing with an order made on a preliminary objection such as that which was decided by the Chairman and Justices in the present case.

Solicitor for objecting parishioner: *W. J. Dunlea.*
Solicitor for applicant: *A. Julian.*

J. H. P.

MACBETH *v.* BULLER (1).

(1894. No. 9098.)

Q. B. Div.
1894.
Nov. 27.

Practice—Third party notice—Directions how to proceed—Liberty to third party to defend—Costs—Form of order—R. S. C. Ir., Order XVI., Rules 53 *and* 54.

Where an action was brought against a sheriff for wrongfully seizing the goods of the plaintiff, the sheriff being indemnified by the execution creditor, who was brought in as a third party, the Court, upon motion for directions, made an order in the form adopted in *Norris* v. *Beazley* (46 L. J., N. S., C. P. 515).

MOTION FOR DIRECTIONS.

An action having been brought by Jane Boggs, the person served with a third party notice, against the husband of the present plaintiff jointly with another person, and a judgment therein recovered, the sheriff proceeded to execute a *fi. fa.* by seizing goods claimed by the present plaintiff as her separate property. The sheriff obtained an indemnity from Boggs as to any liability incurred by him in dealing with the property under these circumstances, and thereupon proceeded to hold a sale, at which the goods were bought in by the plaintiff Jane Macbeth. The plaintiff then brought an action against the sheriff to recover the amount paid by her for the goods at the sale as money received by him to her use.

The defendant served a third party notice on Boggs, to which an appearance was entered, and now applied under Order XVI., Rules 53 and 54, for directions as to the manner in which the liability of Boggs to the defendant should be determined, and that Boggs, admitting her liability to indemnify the defendant, might have liberty to defend this action on the pleadings therein already filed.

Chambers, for the defendant.

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(1) Before JOHNSON and MADDEN, JJ.

Watts, for the plaintiff.

Bird, for the third party.

[The following cases were referred to :—*Norris & another* v. *Beazley* (1) ; *Williams* v. *Buchanan* (2) ; *Coles* v. *Civil Service Association* (3) ; *Edison & Swan Co.* v. *Holland* (4)].

THE COURT made an order in the following terms :—

> "ON hearing, &c. : It is ordered, the said Jane Boggs hereby admitting her liability, that the said Jane Boggs, the said third party cited herein, be at liberty to defend the action by the same solicitor and counsel as the defendant, and be jointly liable with him for the costs of this action, and to be entitled to only one set of costs with him as against the plaintiff, and to be bound by any judgment the plaintiff may recover against the defendant ; that no further pleadings be filed in the action, plaintiff to reply by joining issue, and that the costs of this motion, of all parties, be reserved for the Judge at the trial."

Solicitor for the plaintiff : *T. C. J. Mackintosh.*
Solicitor for the defendant : *Henry T. Stewart.*
Solicitor for the third party : *P. Gallagher.*

J. H. P.

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(1) 46 L. J. (N. S.) C. P. 515.

(2) 7 *Times'* Rep. 226.

(3) 26 Ch. D. 529.

(4) 41 Ch. D. 28 (C. A.).

JOSEPH PEAKIN v. JANE PEAKIN AND MARY PEAKIN (1).

Ex. Div.
1895.
Feb. 22, 26.

(1894. No. 4677.)

Statute of Limitations—Non-adverse possession—Character of occupation.

The owner of a house allowed his sisters to reside therein, and contributed to their support. He paid the rent and taxes and executed all necessary repairs:—

***Held*, that the occupation was in the character of guests and not of tenants at will, and that the Statute of Limitations did not run as against the owner.**

New Trial Motion.

The action was brought by the plaintiff, as administrator of his father W. Peakin deceased, to recover possession of a house situate in Grand Canal-street, in the city of Dublin, and was tried in the Michaelmas Sittings, 1894, before Mr. Justice Murphy, sitting without a jury. On behalf of the plaintiff it was proved that by a lease dated 29th August, 1844, the said house together with other houses were demised to the lessee therein named to hold for a term of years still subsisting; and after divers assignments the lessee's interest therein was, by a conveyance dated 27th February, 1867, assigned to the said W. Peakin for the residue unexpired of the said term. The said W. Peakin was up to the time of his death engaged in the victualling business; and the defendants were his sisters. About the year 1869, W. Peakin allowed the defendants into occupation of the house, and they since continued in such occupation. Up to the date of his death, which occurred on 30th June, 1894, W. Peakin paid all the head rent and taxes due out of and in respect of all the premises demised by the said lease of 1844, supported the said defendants by a weekly allowance of meat and money, and executed repairs to the house, including the whitewashing of all the houses, which was done about two months before his death. After the death of W. Peakin, the plaintiff continued

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(1) Before Palles, C.B., and Andrews, J.

Ex. Div.
1895.
PEAKIN
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to support the defendants, and gave them a weekly supply of meat, in the same way as his father had been in the habit of doing. On 21st August, 1894, the plaintiff obtained administration to his father, and he subsequently informed the defendants that he required possession of the house, which was about to be sold. The defendants at first gave no reply, then they promised to give up possession; and finally they refused to leave.

On behalf of the defendants, Jane Peakin was examined and proved that prior to 1869 she and her sister resided at Portobello, and were residing there when their father died. In 1869, there were two brothers living, W. Peakin and another, and it was arranged between them and W. Peakin that they should go to live in the house in Grand Canal-street; and after making such arrangement they went into occupation thereof, and W. Peakin brought a van and took their furniture into the said house. They lived in the house ever since. There was nothing said about paying any rent for it; and they never paid any rent. For some years after going into occupation the other brother used to supply them with meat; and after his death W. Peakin continued the said supply. Sometime before the death of W. Peakin, the other houses were being whitewashed; and the said house was also whitewashed at the same time.

The evidence having closed, His Lordship gave judgment for the defendants with costs.

The plaintiff then moved to set aside the said verdict and judgment, and enter same for the plaintiff.

R. E. Meredith, Q.C. (with him *Jefferson*), for the plaintiff:—

The verdict and judgment should be entered for the plaintiff. The occupation by the defendants was not an adverse occupation to the plaintiff or his predecessor. They merely occupied the premises as guests of the said W. Peakin and by his sufferance. Consequently there was no independent occupation, and their possession was in law the possession of W. Peakin: *Lessee Moore* v. *Doherty* (1); and Darby and Bosanquet's Statutes of Limitation, p. 354. The

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(1) 5 Ir. L. R. 449.

Ex. Div.
1895.
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relation of landlord and tenant did not exist between W. Peakin or the plaintiff and the defendants. The facts of the case are similar to those in *Allen* v. *England* (1) in which it was held that the person in actual occupation did not acquire a title to the premises under the Statutes of Limitation. [Counsel also cited *Doe* d. *Groves* v. *Groves* (2).] The facts of the case plainly show that the defendants were merely let into occupation as the guests of the plaintiff, who not merely supported and maintained them by voluntary gifts, but also paid the rent and taxes in respect of the premises and executed all necessary repairs. Under those circumstances the defendants' occupation was not an independent or adverse one; and consequently they are debarred from relying on the Statute of Limitations for the purpose of vesting a title in them.

S. L. Brown, for the defendants:—

The evidence is consistent with two things, namely, the defendants were tenants at will, or else W. Peakin made them a present of the house. If they were tenants at will, the verdict and judgment were rightly entered for them: *Doe* d. *Dayman* v. *Moore* (3). On the other hand, if the house was made a present to them, they are clearly entitled to succeed.

The judgment of the Court was delivered by—

Andrews, J.:—

In my opinion this is a case in which the occupation of the house in question by the defendants was not an independent possession by them. The possession of the owner of the house continued, notwithstanding the occupation by the defendants, whose real position was merely that of his guests. It was in this capacity that they were allowed to enter in 1869, and there never was any change in the nature of their occupation. Their brother, the owner, assisted to support them partly by giving them gratuitous accommodation in the house, and partly by contributing supplies, and the occupier's taxes were throughout paid by him.

3 F. & F. 49. (2) 10 Q. B. 486. (3) 9 Q. B. 555.

Ex. Div.
1895.
PEAKIN
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PEAKIN.
Andrews, J.

The defendants neither gave, nor were to give, anything in the nature of a render or return, and there was no tenancy of any kind between them and the owner. The question comes no doubt to a question of fact, but in my opinion the proper inference from the evidence is that which I have stated. The defendants now seek to change the position they really stood in towards their brother, and claim to have been in as tenants at will, and to that extent in as owners, and they ask the Court to hold that they are now absolute owners, by virtue of the operation of the Statute of Limitations. I hold, upon the facts, that the statute never began to run, for the owner never was out of possession, and he could, in my opinion, have at any time sustained an action in the nature of trespass *quare clausum fregit*, without entry, founded on his actual possession. I may add that in *Doe* d. *Dayman* v. *Moore* (1), relied on by Mr. Brown, the jury found that the defendant had occupied as tenant at will, and that finding was accepted by the Court. This is not that case. The verdict directed for the defendants must, therefore, be set aside, and a verdict entered for the plaintiff with costs; and the defendants must pay to the plaintiff the costs of this argument.

Solicitor for the plaintiff: *W. J. Shannon.*
Solicitor for the defendants: *T. J. Furlong.*

J. P. B.

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(1) 9 Q. B. 555.

ADAMS, TENANT; ALEXANDER, LANDLORD (1).

Appeal.
1894.
June 18, 19, 27.

Redemption of Rent (Ireland) Act, 1891—*Fee-farm grant made in* 1837—*Church Temporalities Acts—Relation of landlord and tenant.*

A lessee of certain lands under a lease containing a *toties quoties* covenant for renewal also held from his lessor in that lease certain other lands under a tenancy from year to year. The lessee became entitled under the Church Temporalities Acts to a grant in perpetuity of the leasehold lands, and he thereupon under the said Acts obtained from his lessor a grant in perpetuity of the lands comprised in the lease. This grant was made in the year 1837, and included beside the leasehold lands other lands of which the grantee had previously been tenant from year to year, reserving a bulk rent in respect of the entire of the lands, secured by a covenant for payment and a proviso for distress applicable to the whole:—

Held (*diss.* Fitz Gibbon, L.J.), that the owner of the grantee's interest was not entitled to the benefit of the Redemption of Rent (Ireland) Act, 1891, as no relation of landlord and tenant was created by the grant of 1837.

Semble, fee-farm grants made under the Church Temporalities Acts, or under the Renewable Leasehold Conversion Act, being fee-farm grants to which there is attached as a statutory incident the right to bring ejectment for non-payment of rent, and also fee-farm grants made since the Landlord and Tenant Act, 1860, create the relation of landlord and tenant for the purpose of enabling the grantee to claim the benefit of the Redemption of Rent (Ireland) Act, 1891

APPEAL from an order of the Irish Land Commission Court, dated February 27, 1894, dismissing the tenant's application to have a fair rent fixed under the provisions of the Redemption of Rent (Ireland) Act, 1891.

By indenture dated October 1, 1825, and made between Nathaniel, Lord Bishop of Meath of the one part, and John Hunter of the other part, the Bishop of Meath demised to John Hunter a piece of land situate in the townland of Aghadoey, containing 24 acres (Irish), with 3 acres of bog in the townland of Ballynakelly, then in the possession of John Hunter, to hold for a term of twenty years, subject to the rent of £48 (Irish). This lease contained a *toties quoties* covenant, by which the lessor bound himself to renew the same to the lessee, as often as he would obtain a renewal from the Bishop of Derry of a lease of lands of which this demise to John Hunter formed a part.

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(1) Before WALKER, C., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

By indenture dated April 14, 1835, and made between the Lord Bishop of Derry of the first part, the Ecclesiastical Commissioners for Ireland of the second part, and the said Nathaniel, Lord Bishop of Meath, of the third part, the lands comprised in the said lease, along with other lands (including the two farms subsequently mentioned) were, by virtue of the 3 & 4 Wm. 4, c. 37, conveyed to the said Nathaniel, Lord Bishop of Meath, his heirs and assigns for ever, subject to the rent reserved by the said indenture. The purchase-money for this perpetuity, £537 15*s*. 6*d*., was duly paid by the Bishop of Meath to the Ecclesiastical Commissioners.

On this grant in perpetuity having been made to the said Nathaniel, Lord Bishop of Meath, the said John Hunter, as his lessee, with the benefit of the said *toties quoties* covenant for renewal, applied, as he was entitled to do, under the 6 & 7 Wm. 4, c. 99, to the said Nathaniel, Lord Bishop of Meath, for a conveyance of the perpetual estate in the said portions of the lands of Aghadoey and Ballynakelly, which he held under the said lease of October 1, 1825. Besides the portion of Aghadoey included in this lease, John Hunter also held from the said Lord Bishop of Meath apparently as tenant from year to year, but certainly without the benefit of any *toties quoties* covenant for renewal, two other farms in Aghadoey, containing respectively 9 acres and 3 acres, Irish, and it was agreed between the parties that these two farms should be included in the proposed conveyance, and a bulk rent reserved in respect of the entire lands, so much of the said rent as was reserved out of the leasehold lands being ascertained in the mode prescribed by the statute.

Accordingly, by an indenture, dated July 25, 1837, and made between the said Bishop of Meath of the one part, and the said John Hunter of the other part, reciting the lease of October 1, 1825, the grant in perpetuity of April 14, 1835, that John Hunter was liable under the Church Temporalities Acts to con-

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tribute to the Bishop of Meath a portion of the purchase-money paid by him for the said grant in perpetuity, and that he had agreed to pay to the said Bishop the sum of £54 as such contribution, and further reciting the said agreement for a conveyance of the said leasehold lands and the said two farms in perpetuity, the said Nathaniel, Lord Bishop of Meath, in consideration of the said sum of £54, and the rents thereinafter reserved, granted to the said John Hunter, his heirs and assigns, "All that and those that farm of land hereinbefore mentioned, situate in the townland of Aghadoey, containing 24 acres Irish plantation measure, be the same more or less, together with 3 acres of bog in the townland of Ballynakelly, as demised by the said recited *toties quoties* lease of the 1st October, 1825, and also all that lot or farm of land containing 9 acres formerly in the possession of the Reeds, and also the lot containing 3 acres, and the house and garden belonging thereto, formerly called M'Kendry's holding, both situate in the townland of Aghadoey, and containing in the whole 39 acres, or thereabouts, Irish plantation measure, all which lands and premises are situate in the parish of Aghadoey, half barony of Coleraine, and county of Londonderry aforesaid, being part of the beforementioned lands and premises granted and conveyed to the said Nathaniel, Lord Bishop of Meath, by the said Richard, Lord Bishop of Derry, and the said Ecclesiastical Commissioners for Ireland," to hold the same "unto the said John Hunter, his heirs and assigns, to the only use and behoof of him the said John Hunter, his heirs and assigns, from the 1st of November last past for ever, in as full and ample a manner as the said lands are demised by the said Lord Bishop of Derry, and the Ecclesiastical Commissioners, to the said Lord Bishop of Meath," subject to an annual rent of £67 13*s.* 8*d.* This conveyance to John Hunter contained a covenant for payment of the bulk rent out of the entire lands, and also a proviso for distress on non-payment relating to the entire lands.

All the interest of John Hunter in the said lands subsequently became vested in the tenant, John Adams, and the estate of the said Bishop of Meath in the said perpetual rent became vested in the landlord, Nathaniel S. Alexander.

The tenant served an originating notice of application to

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redeem his rent, and for an advance under the Land Purchase Acts, to carry out such redemption, or, in case the grantor did not signify his consent thereto in the prescribed manner, and within the prescribed time, to have a fair rent fixed.

The grantor did not consent to have the rent redeemed, and the case accordingly came before a Sub-Commission as an application to have the fair rent of the holding fixed. The Sub-Commission dismissed this application on the ground that as regards the portion of the lands which originally were not held under any *toties quoties* covenant, the relation of landlord and tenant did not exist. On the application of the tenant the application was reheard by the Land Commission Court, who affirmed the decision of the Sub-Commission, and from whose judgment the present appeal was brought.

Andrew Todd and *W. H. Brown*, for the appellant:—

All the lands in the originating notice were held before 1837 by John Hunter as tenant, whether of the portion of 24 acres or of the portion of 12 acres. In these circumstances the fee-farm grant was made, not to a stranger to the lands as in *Kelly* v. *Rattey* (1), but by a landlord to a tenant. This relationship (in the sense of the Land Law Ireland Acts) was not destroyed by the grant, but continued in and through it, and now subsists for the purposes of the Redemption of Rent Act, 1891. Or, if the portion of 12 acres, held originally from year to year, be not within the Redemption of Rent Act, as not having been held under a *toties quoties* covenant for renewal, then such portion should be excluded from the area in the originating notice, and a rent fixed on the remainder which, by the decision in *Hamilton* v. *Casey* (2), is clearly within the Redemption of Rent Act. The smaller portion is severable, as it never formed, on this assumption, portion of the "holding." Besides the bulk rent now issuing out of all the lands is merely the sum of two distinct rents as set out in the grant itself and in it appropriated to the separate portions of 24 acres and 12 acres respectively. Moreover, the "holding," in this alternative being merely the lands held originally under

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(1) 32 L. R. Ir. 445.

(2) 27 Ir. L. T. R. 46.

Appeal.
1894.

Adams,
Tenant;
Alexander,
Landlord.

the renewable lease cannot now be excluded from the Land Acts by reason that the 12 acres may not be within the Act; for no part of the rent of the "holding" (*i.e.* the 24 acres) was payable in respect of the smaller and other portion also contained in the grant. In this event the originating notice should be amended by striking out the smaller holding, and the notice thus amended referred back to the Sub-Commission to fix a rent, if otherwise such holding were not excluded from the operation of the Act.

Matheson, Q.C., and *W. Moore*, for the respondent:—

This Court has decided in *Kelly* v. *Rattey* (1), that a fee-farm grant where no tenure is created, if executed before 1860, is not within the Redemption of Rent (Ireland) Act, 1891. There is no tenure here: the fee-farm grant cannot be subdivided; the rent reserved is a rentcharge: *Byrne* v. *Hugo* (2); *Clarke* v. *Staples* (3); therefore a grant made under the Church Temporalities Acts is outside the Act; such a grant is in reality a purchase subject to a rentcharge; it is subject to an *ad valorem* stamp duty: Edge on Leases, p. 198. Section 30 of 4 & 5 Wm. 4, c. 99, destroys all the reversion in the case of a purchase of a sub-interest. Grants made under these statutes do not create the relation of landlord and tenant: on the contrary the remedies for the recovery of the rentcharge are expressly given against the grantee "as if he were tenant." If the Legislature had intended to give these powers as between landlord and tenant it might have so provided *non obstante quia emptores*: *Verschoyle* v. *Perkins* (4). The deed contains one indivisible covenant to pay a single rent which cannot be apportioned between the lands formerly held under the *toties quoties* lease, and the lands held from year to year: *Baynton* v. *Morgan* (5). Even if it could be so apportioned a substantial portion of the entire holding is outside the Act: *Wall* v. *Eyre* (6).

Cur. adv. vult.

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(1) 32 L. R. Ir. 445.
(2) 1 Ir. Eq. R. 357.
(3) 5 Ir. Eq. R. 246.
(4) 13 Ir. Eq. R. 72.
(5) 22 Q. B. Div. 74.
(6) 32 L. R. Ir. 475.

Appeal.
1894.

Adams, *Tenant;* **Alexander**, *Landlord.*

June 27.

Walker, C.:—

This case is another illustration of the difficulties arising on that singularly ill-framed statute, the Redemption of Rent Act, 1891; and I regret that the attempt to have it amended so as to carry out the probable intentions of its framer, failed.

The facts are:—Prior to the 25th July, 1837, the Bishop of Meath, in his individual capacity, held from the See of Derry the townland of Aghadoey, under a lease containing a covenant for renewal, and he subdemised part, viz. 24 acres, with 3 acres of bog to J. Hunter, for twenty years, with a *toties quoties* covenant for renewal at a rent of £48.

The Bishop, under the 3 & 4 Wm. 4, c. 37, obtained a grant in perpetuity from the Ecclesiastical Commissioners, the purchase-money being £537 15*s* 6*d*., under a grant of the 14th April, 1835.

John Hunter, being so entitled, applied to the Bishop for a sub-grant. His contribution was fixed at £54, and the rent was £44 6*s*. 2*d*. sterling.

It appears that J. Hunter, at the same time held under the Bishop, as yearly tenant, another farm of 9 acres and 3 acres, which were part of the lands included in the Bishop's grant. That being so a fee-farm grant of the 25th July, 1837, was executed by the Bishop to Hunter, including both holdings, the grant of one portion being intended to operate under the Church Acts, and the grant of the smaller portion by way of original grant. [His Lordship read the recitals, operative part, and *habendum* of the deed of July 25, 1837].

What is the effect of the deed? I apprehend it is clear that the rent being a single one, and the grant being a fee, the rent is a rentcharge and not a rent service; no ejectment for rent could be sustained, and the legal relation of landlord and tenant does not exist; and that would be so as regards the 12 acres, though Hunter had been yearly tenant before of that bit.

The question does not in my view directly arise, but I should be prepared to say that grants under the Renewable Leasehold Act and Church Acts are within the Act, and that the statutable relation of landlord and tenant, including the right to bring ejectment for rent, is sufficient for the purpose. The subject-matter for the Act to operate on is such converted interests and grants since 1860, and, possibly, some old common law grants, if such there be in Ireland, to which the Statute *Quia Emptores* does not apply. How far does our decision in *Kelly* v. *Rattey* (1) carry us? I cannot say that that case, which I have reconsidered, could have been otherwise decided. There was an attempt there to make out the relation of landlord and tenant, but the legal operation of the grant prevailed, and no real distinction between that case and this exists.

In his judgment in that case Lord Justice Fitz Gibbon says:—"The relation of landlord and tenant might arise at any time from tenure, and since 1860 it may be created by contract. The deed under which the appellant holds cannot create that relation in either of these ways, for it conveys the fee, it creates no tenure, and it was made before 1860. Therefore the grantee is a person occupying land without being a tenant, and he pays his rent to a person who is not his landlord."

There is a large class of grantees in fee-farm, viz. grantees under the Renewable Leasehold Conversion Act and under the Church Acts, who, in my opinion, are within the Act of 1891. Lord Justice Fitz Gibbon thinks those grantees are not within this Act, save by the application of a principle which includes the applicant. In my opinion these classes are within it, because they are outside the principle which applies to this case, and stand on much surer ground. Though we arrive at the inclusion of those classes by different views, I think the exclusion of the special applicant in this case rests upon a sounder principle.

Being of opinion, therefore, that this case is absolutely bound by our decision in *Kelly* v. *Rattey* (1), I think the order of Judge Bewley was right, and that the appeal must be dismissed.

There, as here, there was an attempt so far as language went, to create the relation of landlord and tenant, apt language for the creation of a demise was used, and covenants applicable to such a relation were inserted. There also it would appear that the grantee had been in possession as tenant before the fee-farm grant was made. It would be impossible to split up the holding and make

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(1) 32 L. R. Ir. 445.

Appeal. 1894.

ADAMS, *Tenant;* ALEXANDER, *Landlord.*

the Act of 1891 applicable to the part originally held under the Church lease. The Act of 1891 does not fail to operate for want of a subject.

PALLES, C. B. :—

I am also of opinion that the decision should be affirmed. I hold that the grant in the present case was not made in pursuance of the Church Temporalities Acts, by reason of a substantial portion of the land included in it having been previously held under a tenancy to which no *toties quoties* covenant was attached. It follows, I think, that the grant cannot have the operation which the statutes ascribe to grants executed in pursuance of their provisions. I also hold that we cannot separate one fee-farm grant of one parcel of land at one entire rent into two separate grants of two separate parcels of land at two separate rents, and treat the one parcel of land as falling within and the other as falling outside the Redemption of Rent Act of 1891. We cannot force on the parties a contract different from that which they have entered into. By their contract the rent is to issue out of each and every portion of the lands comprised in the grant. We cannot say that part of the rent is to issue out of one part of the lands, and the rest of the rent out of the other part of the lands exclusively. We have no jurisdiction at this stage and in this Court to reform the deed, even if there is a case to reform, as to which I say nothing. I think the grant before us is equivalent to a Common Law grant in fee-farm made previous to the date when the Act of 1860 came into operation, and that it passed the fee of the lands subject to a rent charge, and not a rent service. Such a grant does not create "the relation of landlord and tenant" in the ordinary sense of the words. I am of opinion that the decision of this Court in *Kelly* v. *Rattey* (1), is that some relation of landlord and tenant is necessary to make a fee-farm grant come within the scope of the Act of 1891. I have read the case of *Kelly* v. *Rattey* (1) carefully more than once since the argument of the present case, and I entirely agree in that decision. But even if I differed from it I should have held myself conclusively bound by it. It may be the full Court of Appeal could reconsider the decision, but one member of the Court cannot. For this reason, holding myself bound by that decision—though I take care in the first instance to say that I agree with it, and that I should have decided in the same way had I been sitting in that case—I am of opinion that, in order to bring himself within the Act of 1891, any fee-farm grantee must show that there exists between him and the person to whom he pays his rent some relation of landlord and tenant. The grounds upon which *Kelly* v. *Rattey* (1) was decided are thus stated by my colleague, Lord Justice FitzGibbon:—"In my opinion we cannot discard the essence of the definition of 'holding,' the existence of a 'contract of tenancy.' The foundation of the entire legislation is the relation of landlord and tenant. The words which describe the person benefited as one who '*holds* his land at a rent which the Land Commission consider to be . . . . a full agricultural rent,' do not seem to contemplate the case of an occupier who pays a rent-charge or a rent-seck, but, on the other hand, they naturally apply to persons who, but for the character of their tenure, would have been within the earlier Acts—that is, to persons between whom and someone else the relation of landlord and tenant exists. The closing words of the section support this view, for when the lessor and lessee, or grantor and grantee, as the case may be, fail to come to an agreement, the occupier is to be deemed to have made an application under the Act of 1887, and *to be a tenant of the present tenancy*, subject to all the statutory conditions imposed by the earlier Acts." The learned Lord Justice then proceeds to answer an argument which evidently had been urged in that case on behalf of the appellant—viz., that to construe the Act in this manner would unduly limit the class of grantees who could claim its benefit. "Nor can it be said that by limiting the class of grantees to which the Act applies to grantees who are 'tenants' we deprive the Act of operation. For this interpretation brings a very considerable number of occupiers under fee-farm grants within the benefits conferred by the Legislature, notably tenants who have obtained fee-farm grants under the Renewable Leasehold Conversion Act."

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(1) 32 L. R. Ir. 445.

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(1) 32 L. R. Ir. 445.

Now, in my opinion, what I have said up to this absolutely rules and determines the present case, and I would not have thought that it would be at all necessary to consider whether a grant under the Church Temporalities Acts was within the scope of the Act of 1891. But I understand that Lord Justice FitzGibbon thinks that unless grants like that before us in this case are within the Act of 1891 there will be no sufficient subject-matter on which that Act can have operation, having regard to the view of the Legislature—that is, that although admittedly there is some subject-matter, viz. grants made subsequently to the coming into effect of the Act of 1860, and grants made pursuant to the provisions of the Church Temporalities Acts, and the Renewable Leasehold Conversion Act, and, possibly, grants of lands in old manors—my learned colleague does not consider this subject-matter sufficient to satisfy the intention of the Legislature, as expressed in the Act of 1891. I differ from this view, and, therefore, it will be convenient that I should express my opinion on the scope of the Act of 1891. I conceive that within this Act are all grants made in pursuance of the Church Temporalities Acts, and the Renewable Leasehold Conversion Act, which contain provisions that ejectment for non-payment of rent may be brought in the event of the non-payment of the rent-charge reserved by conveyances executed pursuant to these Acts. I am fully aware that neither of these Acts says that the relation of landlord and tenant is created by a grant in fee-farm made under its provisions, and that each statute shows affirmatively by the frequent use of the words "*as if he were tenant*" that it did not intend this relation in the strict sense to exist. Such a relation would, in the language of modern statutes, be expressed by an enactment that "the grantee shall, for the purpose of the ejectment statutes, be *deemed to be* a tenant" to the grantor. I am, however, of opinion that not only is the Act of 1891 part of one entire code, of which the Acts of 1881 and 1887 are other parts, but that all those Acts taken together are but part of another more extensive code of which all our ejectment statutes are another and essential part. The object of the later statutes was not merely to relieve the tenant from *personal* liability from the excess of his contract rent over the amount which the Legislature deemed to be fair, but also, indeed, I might say *primarily*, to prevent him from being evicted for non-payment of such excess. The ejectment statutes thus become *in pari materia* with the modern legislation, and all must be construed together as an harmonious whole.

For this reason I am of opinion that where one holds from another land out of which a yearly sum issues to such other, under such circumstances that ejectment for non-payment of rent can be maintained by reason of the non-payment of such yearly sum, the relation which exists between such persons is, for the purpose of the entire code, that of landlord and tenant.

For instance, I am of opinion that an ejectment for non-payment of rent brought by a grantor against a grantee under the Church Temporalities Acts, or the Renewable Leasehold Conversion Act, comes within section 30 of the Act of 1887, and that the grantee in a fee-farm grant, made under either of those Acts, would be entitled to the relief given by that section in the event of an ejectment being brought for non-payment of the fee-farm rent. If this be the true operation of these statutes, I think that it will be admitted that section 1 of the Redemption of Rent (Ireland) Act, 1891, has a subject-matter sufficiently extensive to satisfy the intention of the Legislature as gathered from the words of the Act.

Fitz Gibbon, L.J.—

I find myself in a peculiar position in this case, for I decided *Kelly* v. *Rattey* (1) on the expressed opinion that grants which I cannot distinguish from the grant in this case were notably within the operation of the Act of 1891, and yet this case is now being decided against the grantee upon the authority of *Kelly* v. *Rattey* (1).

The originating notice in this case was dismissed solely on the ground that the relation of landlord and tenant did not exist between the parties, for the purposes of the Redemption of Rent Act, 1891. That ground alone has been discussed here, and other grounds appearing upon the evidence, such as the character of the holding, and the amount of the rent, have not been considered at

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(1) 32 L. R. Ir. 445.

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all, either by the Land Commission or in this Court. If the alleged tenant succeeded in the appeal, it would have been necessary to remit the case to the Land Commission to consider the other questions to which I have referred. At present I assume that if the relation of landlord and tenant exists, *i.e.* if the case is not governed by our decision in *Kelly* v. *Rattey* (1), the holding is in all other respects within the Act of 1891, though there is persuasive evidence to the contrary, and I only wish that the case had been decided on other grounds. In my opinion the relation of landlord and tenant, within the peculiar meaning and for the special purpose of the Redemption of Rent Act, 1891, exists, and the case is not only not ruled against the tenant by *Kelly* v. *Rattey* (1), but the tenant belongs to a class of occupiers under fee-farm grants undistinguishable from the grantees of converted leaseholds, to whom, in that case, I referred as being "notably within the benefits conferred by the Legislature." I could not concur in dismissing this appeal, therefore, without extending the previous decision to cases to which I have already expressly stated my opinion that it does not apply. Furthermore, I think that the only sense in which "the relation of landlord and tenant" does not exist between the parties now before the Court, is one which would leave nothing for the Act of 1891 to operate upon, except the rare and special instances of tenure to which the Statute *Quia Emptores* does not apply, and cases of fee-farm grants which fall within the Act of 1860, section 3, as "agreements by one party to hold land from or under another in consideration of any rent." While this case lies outside the principle of my judgment in *Kelly* v. *Rattey* (1), I find myself unable to find any safe or even intelligible distinction between the relation which exists here between Adams and Alexander, and that which exists between all grantors and grantees under the Renewable Leasehold Conversion Act, and all grantors and grantees under the Church Temporalities Acts. I cannot impute to the Legislature, when passing the Act of 1891, the capricious, if not fantastic, intention of limiting its benefits to *non obstante quia emptores* grantees, and grantees since 1860, and if I bring in grantees of converted leaseholds under the Acts I have mentioned, I cannot exclude Adams, whose relation to his

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grantor is to my mind undistinguishable from theirs. To make my judgment clear, I must first see the relation which existed in *Kelly* v. *Rattey* (1), then see the relation which exists under the Leasehold Conversion and Church Temporalities Acts, and finally compare each with the relation existing in the present case.

Besides and in addition to the more general grounds to which I have referred, I think that the special circumstances and terms of tenure in this particular case bring it within the Act of 1891; but I must first deal with the wider question.

In *Kelly* v. *Rattey* (1) the grantee was a stranger to the lands, and stood in no relation whatever to the grantor, until he took the grant of February 9, 1846, though that grant states, as all such grants do, that the granted lands were in the grantee's possession at the date of execution. Therefore, unless that grant created the relation of landlord and tenant, the relation did not exist. It was a grant in fee, *habendum* to "heirs, executors, administrators and assigns, for ever." It passed the fee-simple and inheritance, out and out, once and for all, to a person who, until then, does not appear to have been either owner, tenant, or occupier. It appeared that he had applied to become tenant for a long term, and that the deed was altered into a grant for ever under which he for the first time became entitled to the land. It left nothing in the grantor. He wholly ceased to own any interest in the land. The land became wholly the land of the grantee. The *reddendum* was a rent-charge recoverable under the terms of the grant by distress and re-entry, but still a rent-charge, and nothing more. At no time, and in no sense, did the relation of landlord and tenant exist, and to such cases this Court has decided, and I was a party to the decision, that the Redemption of Rent Act, 1891, does not extend. Therefore, so far from questioning *Kelly* v. *Rattey* (1), I am only now endeavouring to follow what I there intended to decide, and said I was deciding. But in the same case the Lord Chancellor (p. 449) said:—"It is clear that grants since the Act of 1860 would be within it" (the Act of 1891), "and I think also grants in perpetuity under the Renewable Leasehold Conversion Act." I also said that the interpretation which we then put upon the Act "brings a very considerable number of occupiers under fee-farm

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(1) 32 L. R. Ir. 445.

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grants within the benefits conferred by the Legislature, *notably* tenants who have obtained fee-farm grants under the Renewable Leasehold Conversion Act." Therefore, it did not exclude converted leaseholds, and I at least was of opinion that they were included in the Act of 1891.

Kelly v. *Rattey* (1) is still fresh in all our memories, having been so admirably argued by Mr. John Edge, counsel for the grantee. He urged that the Leasehold Conversion Act "nowhere provides that the relation of landlord and tenant is created by grants in fee-farm made under its provisions," and also that "grants made under patents *non obstante quia emptores* are fee-farm grants, but in *Verschoyle* v. *Perkins* (2) it was decided that one of these grants did not create the relation of landlord and tenant, and was not therefore a 'letting, setting, or demise,' under 2 & 3 Wm. 4, c. 119, section 13." But we disregarded these arguments.

What is the distinction between the relation of the parties in *Kelly* v. *Rattey* (1) and the relation between the grantor and grantee of a converted leasehold? It is not the existence of the relation of landlord and tenant in the legal sense. Reference to the Statute will fully bear out the observation of the Lord Chancellor (page 449), that the Renewable Leasehold Conversion Act "does not make the relation of grantor and grantee rest in contract of tenure by relation, but gives remedies *notwithstanding that it does not*." This is the key of my judgment in the present case. I hold that where a landlord and a tenant, standing in that relation, execute a fee-farm grant, in other words, make the tenure perpetual, they are within that relation still, for the special purposes, and within the untechnical meaning of the Act of 1891. Unless we are to attribute a purpose to the authors of that Act, so limited as to make it practically inoperative, leaseholds for lives renewable for ever, and leaseholds renewable by custom or by covenant, when converted into fee-farm holdings, are within it, though the Leasehold Conversion Act expressly declares that, according to its terms, grantors and grantees of converted leaseholds cease to stand in the relation of landlord and tenant to each other by the execution of the converting grants.

(1) 32 L. R. Ir. 445.

(2) 13 Ir. Eq. R. 72.

The title of the Act 12 & 13 Vict. c. 105, is "an Act for converting the renewable leasehold tenure of lands in Ireland into a *tenure in fee*." This tenure in fee is subject to *quia emptores*, and the Act itself shows that it is not a tenure between the grantor and grantee. The owner of the lease may require the owner of the reversion to execute "a grant to the owner of such lease of an estate of inheritance *in fee-simple* in the lands, subject to a perpetual yearly fee-farm rent *to be charged* upon such lands," and the same words are used to describe the grants which the owners of under-leases are entitled to demand. Section 6 allows part of the lands to be "allocated *in fee-simple*, in lieu of the fee-farm rent." Section 7 provides that "the reversion shall be converted into *an estate of inheritance in fee-simple* in the fee-farm rent, made payable by such grant . . . , and each such estate of inheritance in fee-simple shall be transmissible and descendible *in like manner as if the same were an estate of inheritance in fee-simple in reversion of the lands* on which the fee-farm rent is charged by the grant creating the same." The estates created under the grants are made "subject to the same uses, trusts, and equities as the estate held under the lease, or under-lease . . . . or as near thereto *as the different natures of the estates* . . . will admit." Under section 10, "covenants . . . shall run *with the estate in fee-simple, into which the estate held under the lease, or under-lease, is converted under this Act*, and the owner or assignee for the time being of such estate in fee-simple, shall be chargeable upon such covenants in the same manner, and to the same extent *as if he were* owner or assignee of the term or interest created by such lease or under-lease, and the *estate out of which* such lease or under-lease was derived were still subsisting; and the benefit of such covenants shall run with the estate *into which such estate is converted under this Act*." Section 15 provides that subsequent grants to owners shall operate to supply or feed previous grants made by owners of inferior under-leases. Section 20 provides that the fee-farm rent shall be recoverable by distress, ejectment for non-payment of rent, action of debt, and all other ways *by which rent-service reserved* on any common lease or demise is by law recoverable, "and these remedies shall apply to every such fee-farm rent, as fully and effectually *as if the same were rent-*

service reserved on a lease for a life or lives," and receipt of the fee-farm rent for three years is made "sufficient evidence of the title of the plaintiff thereto, *as in cases of ejectment for non-payment of rent under the ejectment statutes.*" These, and all the other sections of the Act, proceed upon the clear assumption that the parties are not any longer landlord and tenant, and the machinery of the Act works upon this assumption, giving remedies, in the new relation of grantor and grantee, similar to those which they would have had if the relation of landlord and tenant had still subsisted.

It is a satisfaction to me to know that the Chief Baron is as clearly of opinion as I was in *Kelly* v. *Rattey* (1) and am still, that in spite of the absence of the relation of landlord and tenant in the proper sense, grants under the Leasehold Conversion Act are within the Act of 1891. This opinion minimises the effect of this decision, but what is the principle on which it rests?

In principle, as well as upon the express words of the statute, I cannot recognise the existence of the statutory remedy by ejectment for non-payment of rent as the "cardinal test," as the Lord Chancellor calls it, or even as an indication of the continued subsistence of the relation of landlord and tenant. In the first place, that remedy is a comparatively modern statutory incident, and it does not exist in England. It is therefore not essential to the relation. Secondly, the remedies by distress which are given by the extending Act, 14 & 15 Vict. c. 20, and which are given by contract in the present case under the deed, are more typical of, and appropriate to, the relation of landlord and tenant than the statutory remedy by ejectment. It is by statute, and not by virtue of any estate or reversion, or of the relation of landlord and tenant, that a plaintiff is entitled to proceed by ejectment for non-payment of a fee-farm rent, and I can see no reason for measuring or limiting the operation of the Act of 1891, by the existence or non-existence of this one peculiar statutory remedy.

Every argument which applies to show that the relation of landlord and tenant does not exist between grantors and grantees under the Leasehold Conversion Act, for the purposes and within the meaning of that Act, applies *a fortiori* to show that it does not exist under the Church Temporalities Acts, for the purpose of those Acts. Yet the Land Commission has held in *Hamilton* v. *Casey* (1) that perpetuity grants under those Acts are within the Act of 1891, and has also held in *Gun Cunninghame* v. *Byrne* (2) that a fee-farm grantee under the Leasehold Conversion Act is entitled to redeem his rent. The Church Temporalities Acts uniformly describe the transactions between lessor and lessee under those Acts as "the purchase of perpetual estates," and the deeds as "conveyances of perpetual estates and interests in the lands." Therefore, unless we are to exclude all these fee-farm grants from the Act of 1891, we must find "the relation of landlord and tenant," for the purpose and within the meaning of the latter Act, in something which does not involve tenure or reversion; in short, we must give the necessary relation a meaning previously unknown, and peculiar to the Act of 1891. I find such a meaning, and I give the Act due scope, by assuming that it includes all those fee-farm grants which rest upon the previous existence, up to and at the time of their execution, of the relation of landlord and occupying tenant. This construction in my opinion is most consistent with the purpose of the Act of 1891, it is a natural construction, and it is the construction which I had in my mind when, in *Kelly* v. *Rattey* (3), I said that fee-farm grants under the Leasehold Conversion Act were "notably" within the Act. It distinguishes *Kelly* v. *Rattey* (3), and every other case where the relation never existed, and where there was a pure and simple grant in fee, by an owner to a stranger, in consideration of a rent-charge which never had been a rent-service. This is the only distinction which I can clearly draw which will stop short of excluding from the Act of 1891 all those fee-farm grants, prior to 1860, which, according to *Verschoyle* v. *Perkins* (4), operate as conveyances of the fee-simple, and under which the Master of the Rolls, in that case, at p. 80, held that "the relation of lessor and lessee" no longer "exists between the landlord and the tenant, to whom the fee was conveyed."

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(1) 32 L. R. Ir. 445.

I am greatly strengthened in this construction by the terms of

(1) 27 I. L. T. R. 46.
(2) 30 L. R. Ir. 384.
(3) 32 L. R. Ir. 445.
(4) 13 Ir. Eq. R. 32.

the Act of 1891. It avoids the use of the terms "landlord" and "tenant": it is only by the introduction of the word "holding" that the relation is brought in at all. To ascertain its meaning we must insert the definition of "holding" in place of the word itself, and if we do so the Act runs as follows:—"Where a person in *bona fide* occupation of a parcel of land held by a tenant of a landlord, for the same term, and under the same contract of tenancy, is a grantee under a fee-farm grant, and such person holds his land at a rent which the Land Commission considers to be a full agricultural rent, such occupier shall be entitled to apply to redeem his rent." Though fee-farm grantors and grantees under the Leasehold Conversion and Temporalities Acts are not called "landlords" and "tenants" anywhere in those Acts after conversion, we are obliged, as it seems to me, to conclude that they answer that description for the purposes of the Act of 1891, and I get at this result whenever persons standing in that relation to each other have made their tenure and rent perpetual. They do not alter their relation in any popular sense, though they change the leasehold tenure into a tenure in fee and turn the leasehold rent into a fee-farm rent. The only other alternative is to exclude them altogether, to hold that the decisions of the Land Commission admitting them are wrong, and to confine the Act of 1891 to fee-farm grants within the Act of 1860, or to adopt the capricious, modern, and non-essential test of the existence of the statutory remedy by ejectment for non-payment of rent. This I am not prepared to do.

Applying this principle to the present case, it makes no difference that part of the holding in question was held under a lease with a *toties quoties* covenant for renewal, and part under a tenancy from year to year, for the Bishop of Meath was landlord of both holdings, and he had the same power, by virtue of his estate, to make a fee-farm grant of the yearly tenancy which he had under the Temporalities Acts to make a grant of the leasehold. The only difference was that the tenant had a right to demand the latter, while the former was granted voluntarily—and by contract.

It is to be remembered that, though *toties quoties* covenants are common between *mesne* tenants, occupying tenants very frequently held from year to year, or as lessees for terms, yet they had to help their immediate landlords to purchase their perpetuities, and got sub-grants in return. The result will be strange if a *toties quoties* tenant would be within the Act of 1891, while lessees and tenants who held without covenants to renew, and who may be very much more numerous, would not.

Even if it were otherwise, if a *toties quoties* tenant obtaining a fee-farm grant of an entire church holding is within the Act, I am of opinion, that under the indenture of 25th July, 1837, on the authority of *Morton* v. *Woods* (1), the entire holding in the present case must be treated as held under the same relation, and that the consequences of that relation must, under the deed, be the same as if the whole were a *toties quoties* holding. The deed recites the consent of the Bishop to grant the 24 acres the 9 acres and the 3 acres "for a like term," subject to a bulk rent, and all are to be held together by the grantee, his heirs and assigns for ever, in as full and ample a manner as the said lands are demised by the Bishop of Derry and the Ecclesiastical Commissioners to the Bishop of Meath." The Bishop of Meath was only a private owner, holding directly under a renewable lease from the Bishop of Derry. I do not understand it to be denied that, if he were an occupying tenant, he would be within the Act of 1891 as a fee-farm grantee. Even if the question turned on the existence of the remedy by ejectment for non-payment of rent, and if the Bishop of Meath proceeded by such an ejectment against Hunter, I should hold that, as that remedy would have attached in respect of the 24 acres, if granted alone, the grantee would have been estopped from denying that it attached also to the additional land which was incorporated in the same grant.

Any other conclusion would exclude every grant in which the smallest change of parcels or of rent had taken place. But as I have already said, I base my judgment on the broader ground that the relation of landlord and tenant existed as to the entire holding, in the only sense which is consistent with giving reasonable scope to the Act of 1891.

For these reasons, I think that the case should be remitted to the Land Commission with a declaration that, notwithstanding the terms of the fee-farm grant, this holding is within the Redemption

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(1) L. R. 3 Q. B. 658.

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Act of 1891, but with a further declaration that they should proceed to consider whether the grantee is in other respects a person entitled to apply to redeem his rent.

I entirely agree in the impossibility of dividing the holding, and I cannot see how the benefit offered by subsequent legislation can be made a ground for reforming a deed which operated as the parties intended, as the law stood at the time.

BARRY, L. J. :—

I concur in the decision of the Chancellor, and the Lord Chief Baron.

The case of *Kelly* v. *Rattey* (1), and this case, are two illustrations of the difference between the popular interpretation of an Act of Parliament, and the construction put on the language of the Legislature by Judges who are bound by rigid legal rules of interpretation which they must obey. Hence it happens that Judges often are coerced to put on words in a statute an interpretation, which personally, as individuals acquainted with the history of the legislation, the evils it was intended to cure, the remedies it was intended to supply, the objects it was intended to effect, they must be convinced will wholly or in part defeat the intention of Parliament. This often gives rise to criticism of the Parliamentary draftsman, which I often think is unreasonable; it is forgotten how much easier it is to criticise a defect when discovered by experience than to provide beforehand for every event or contingency which the varied transactions of life may develop. Moreover, in this connexion it should be remembered that Acts, and clauses of Acts, are often drafted by gentlemen who, though clever and skilled and accomplished in their department, have personally no experience in practice of the coercive operation of the rigid rules of legal interpretation in limiting and controlling the judicial power of exposition. These rules are, perhaps, too rigid, they certainly often lead to anomalous results, but in abolishing or relaxing them, there is danger of a greater mischief, namely, the permitting the judicial function to pass the strict line of construction, and assume powers which the constitution confers upon Parliament alone. Now, the first section of the Act of 1891 was obviously drawn in ignorance or forgetfulness of the difference between fee-farm grants executed before the coming into operation of the Landlord and Tenant Act of 1860, and grants executed after that date. The difference, as known to every Irish lawyer, is, that fee-farm grants before the Act created no relation of landlord and tenant: the grantee became owner in fee, the grantor merely a rentcharger. On the other hand, the grant after the Act creates that relation.

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(1) 32 L. R. Ir. 445.

Now, the first section of the Act of 1891 commences:—"When a person in *bona fide* occupation of a holding to which Part I. of the Land Law (Ireland) Act, 1881 applies." In these words is the key to the application of the section, and amongst them the all important, the dominant, word is "holding." Now this word was, up to its introduction in the Land Act of 1870, if not absolutely unknown, certainly unfamiliar, in the terminology of the Irish law of landlord and tenant. From the Act of 1870 it was adopted into the (now principal) Act of 1881, and is there in section 57 defined thus:—"'Holding' during the continuance of a tenancy means a parcel of land held by a tenant of a landlord, &c." It is, I need not say, a settled rule of construction of statutes that once a word, and *a fortiori* a novel or unusual word, is used in an Act of Parliament in a clearly defined sense, it must be taken as having the same meaning wherever it occurs in the same Act, or any subsequent Act in *pari materia*, or forming part of a continuous code with the original Act, unless there be a context coercively excluding such construction. Accordingly, in *Kelly* v. *Rattey* (1), this Court held that the word "holding" in the first section of the Act of 1891 must be interpreted by the definition of that word in the Act of 1881, that the definition unequivocally involved the existence between the parties of the relation of landlord and tenant, and that therefore as the fee-farm grant in that case did not create that relation, the premises did not constitute a "holding" within the meaning of the Act of 1881, or section 1 of the Act of 1891. That decision conclusively governs this case as regards the 12 or so acres held previously to the grant under a

(1) 32 L. R. Ir. 445.

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tenancy from year to year. It was not merely the unanimous decision of this Court, but on the present occasion we have had the vast advantage of the co-operation of the Lord Chief Baron, and he has stated, not only that he is bound by that decision, but that it has his entire approval.

But my brother FitzGibbon is of opinion that *Kelly* v. *Rattey* (1) is distinguishable and does not govern this case; the alleged distinction upon which he relies is that in *Kelly* v. *Rattey* (1), there was previous to the fee-farm grant no relation of landlord and tenant between the grantor and grantee, that they were, to use the words of the Lord Justice, "strangers" to each other, whereas in the present case there existed as to the twelve acres, previously to the fee-farm grant, a tenancy from year to year between the grantor and grantee, and his Lordship holds that the influence of this antecedent relation still continues and by some sort of mysterious force retains the grantee in fee at Common Law still in the position of a tenant to a landlord. With all respect to my brother FitzGibbon, I cannot concur in that opinion, even if it had a foundation in the facts. I could not take so poetic a view as that the aroma of the old tenancy from year to year should, like "the scent of the roses," still hang round the twelve acres, and by its influence prevent or alter the operation of the Common Law grant of the fee. But there appears no foundation in fact for the supposed distinction. In the report of the facts of *Kelly* v. *Rattey* (1), no such circumstance is stated as that previously to the fee-farm grant the grantor and and grantee were "strangers" between whom no relation respecting the land existed. No such circumstance is suggested by counsel in argument or any member of the Court in judgment as existing and furnishing any reason for the decision; and I have just got from the officer the Court papers in that case, and find that the fee-farm grant describes the land as "now in the possession of" (the grantee). This is not the recital of the lease for a year in use up to 1845, but a description of the then actual condition of the premises. It does not specify any particular tenancy, but it certainly negatives the possibility of its being assumed that

(1) 32 L. R. Ir. 445.

the *ratio decidendi* in *Kelly* v. *Rattey* (1) was in any sense or to any degree that the grantor and grantee were, in respect of the land, "strangers to each other."

But it is said that our decision here against the alleged tenant is inconsistent with the judgment of Lord Justice Fitz Gibbon (in which I concurred) in *Kelly* v. *Rattey* (1), deciding that occupiers under fee-farm grants obtained before the Act of 1860, under the Renewable Leasehold Conversion Act are within the benefits of the Act of 1891, whereas it is argued that the Conversion Act does not create by such grants the relation of landlord and tenant. There is no inconsistency. The Renewable Leasehold Conversion Act does not, indeed, in so many words say that "between the grantor and grantee there shall exist the relation of landlord and tenant"; but it does the same thing in a circuitous way by attaching to the relative positions of the parties every incident and characteristic belonging to the relations of landlord and tenant in Ireland. I regretted our decision in *Kelly* v. *Rattey* (1), I regret (still more by reason of its peculiar circumstances) our decision in this case; because I feel that the occupiers are within the policy and intention of the legislation, but are excluded by an oversight of the draftsman of the Act. Still I think it of more importance to the administration of justice that we should maintain certainty and uniformity in the law by abiding by a decision unimpeached and unassailable, and not endeavouring by subtle and shadowy distinctions to evade its consequences in order to meet the exigency of any particular case.

Solicitors for the landlord: *Crookshank, Leech, and Davies.*
Solicitor for the tenant: *Roulston.*

G. Y. D.

(1) 32 L. R. Ir. 445.

Q. B. Div.
1894.
June 12, 13.

REG. *v.* BOUGHTON (1).

*Criminal law—Procedure—*Certiorari*—Fair trial—Crown solicitor's rules.*

When a probability of the existence of prejudice to a substantial extent is established in relation to a county, the Court, in the exercise of its discretion, should not allow the fair and impartial trial of a prisoner to depend upon the power of the officials representing the Crown to order jurors to stand aside, but should remove the proceedings by writ of *certiorari*.

CERTIORARI.

This was a motion, on notice, pursuant to leave given by the Court, on behalf of Thomas Boughton, for a writ of *certiorari* to remove the indictment in this case, and the proceedings thereon into the Queen's Bench Division, and for leave to enter a suggestion on the record that a fair and impartial trial of the issue joined in the prosecution could not be by a jury in the county of Kildare, and that it was convenient that the trial of the said issue should be by a jury of the county of Antrim, or of such other place as the Court should deem proper.

A true bill for murder against the applicant had been found by the Grand Jury of the county of Kildare, at the March Assizes, 1894. The applicant had been thereupon arraigned before the Lord Chief Justice, and had pleaded not guilty. The trial had been then adjourned on the application of *Falconer*, whom the Judge had assigned as counsel for the defence, for the purpose of allowing the present application to be made.

The material facts appear sufficiently from the judgment.

Falconer, for the applicant.

The Attorney-General (*The Mac Dermot, Q.C.*), *Molloy, Q.C.*, and *C. Mac Dermot*, for the Crown.

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(1) Before SIR PETER O'BRIEN, C.J., and O'BRIEN, HOLMES, and GIBSON, JJ.

[The following authorities were cited:—*Reg.* v. *Conway* (1); *R.* v. *Hunt* (2); *Reg.* v. *Duggan* (3); *Reg.* v. *Fay* (4); *Reg.* v. *Barret* (5); *Reg.* v. *Palmer* (6); *Reg.* v. *Walter* (7); *Reg.* v. *Murphy* (8); *R.* v. *Scully* (9); *R.* v. *Bull* (10).]

Cur. adv. vult.

Sir P. O'Brien, C.J.:—

June 13.

A motion has been made in this case for a writ of *certiorari*, in order that the record may be removed, and a suggestion entered that a fair and impartial trial cannot be had in the county Kildare, and that it is convenient that the case be tried by a jury of the county of Antrim, or by a jury of such other county as the Court shall deem proper.

That the Court has jurisdiction to entertain and grant the application has not been denied. Such a jurisdiction has been frequently exercised. Mr. Justice Crampton, when giving judgment in the case of *The Queen* v. *Conway* (1), said that the jurisdiction was undoubted, and that it was a proposition equally true that it is the bounden duty of the Court, in protection of the subjects of the realm, in a proper case, to change the place of trial. He said that was the doctrine of the law, and he added that it was a most wholesome one.

Now, what are the facts in this particular case? How is the present motion sought to be maintained? It appears that the prisoner Boughton was indicted at the last Assizes for the county Kildare for the murder of a man named Fox. The Grand Jury found a true bill against the prisoner, and, when the case was called on for trial, a motion was made by Dr. Falconer for the postponement of the trial, in order that an application might be made to this Court to have the place of trial changed. Counsel for the Crown consented to the application being granted, on the ground that, whether the facts disclosed in the affidavit upon which Mr. Falconer rested his application would warrant a change of venue

(1) 7 Ir. C. L. R. 507.
(2) 3 B. & Ald. 444.
(3) Ir. R. 7 C. L. 94.
(4) Ir. R. 6 C. L. 436.
(5) Ir. R. 4 C. L. 285.
(6) 5 E. & B. 1024.
(7) 14 Cox C. C. 579.
(8) 1 Cr. & D. 105.
(9) 1 C. & P. 319.
(10) 9 C. & P. 22.

or not, at all events, it was necessary that inquiry should be made as to the truth and substance of the allegations made on behalf of the prisoner. Two affidavits have been made on behalf of the accused, one which was utilized before me in Kildare, and an additional affidavit upon which, as well as upon the former, this present motion was grounded.

The case made by these affidavits was in substance as follows:—That the prisoner Boughton is an Englishman, and an army reserve man, and had been since August, 1893, up to the 18th December last, engaged as a gamekeeper on the Clongorey estate, in the county of Kildare; that that estate has been for the last five years the cause of much litigation and disturbance, which has affected, not only its own immediate neighbourhood, but the whole county of Kildare with a feeling of excitement, antagonism, and prejudice against all persons connected with the estate; that the Plan of Campaign was put in force on that estate; that the National League held meetings at Clongorey and other parts of Kildare, at which the speakers denounced the management of the estate, and the conduct of the trustees and other officials in violent terms; that very many of the tenants were evicted, and their houses levelled, and some were burned to prevent former occupants retaking possession; that their farms were now in the occupation of the landlords; that some of the former tenants had emigrated to America, and some were still in Kildare; that a collection was made throughout Kildare for the evicted tenants, was largely subscribed to in Kildare, and that placards inviting subscriptions were still posted up. The 8th paragraph of the affidavit of Mr. Lanphier which was made to found this motion is as follows:—

"All of the above circumstances have caused a very disturbed, angry, and excited feeling to exist over the whole of this county in reference to said Clongorey estate, and all persons connected with it, and have formed the subject of much discussion in the local newspapers, and amongst the inhabitants generally. In consequence of the foregoing, and also because the prisoner is an Englishman and a soldier, and was engaged when the alleged crime was committed in watching and protecting his employer's property, I am advised and believe, and humbly and respectfully submit, that, from the excited and prejudiced state of feeling in the county amongst the class of persons who are summoned as jurors, which I myself know to exist from frequent communication with members of the class of persons from which the jury panel is summoned, since December last, it would certainly happen, if the trial took place in the county of Kildare, that persons would be summoned on the jury whose opinions would be tainted with a very strong prejudice against the prisoner, and the prisoner would not receive a fair and impartial trial in county Kildare."

In answer to that affidavit, and in order to resist the motion, the Crown Solicitor, Mr. White, made a very guarded affidavit. I am sure it was carefully and conscientiously prepared. As it is short, I will read it. Mr. White said:—

> "That he believes that many of the evicted tenants have left the country. Some have taken adjoining farms, and a few of the smaller class are labourers in the district and in the adjoining towns. It is not true" (Mr. White says) "that the holdings from which these tenants were evicted are derelict and boycotted. They are at present worked successfully by the trustees for grazing purposes. I do not know to what extent, or whether the subscription for evicted tenants in the county Kildare has been successful, or whether it has been as successful as in other counties of Ireland. The county of Kildare has been, and is, almost free from agrarian crime. With respect to the late injuries to the cattle of a man named Wray, and the hut burned at night, these cases only quite recently occurred, and have not received investigation; and as to them I cannot make any statement. For the last few years the county has been free from riots and unlawful assemblies, and I do not believe that the accused person is unpopular as an Englishman or a soldier, although he may be unpopular with poachers as a gamekeeper. Having regard to the prisoner's right to challenge twenty persons, and to the Crown Solicitors' rule that persons from the district—in this case the district of Clongorey—may, and ought to be directed to stand aside, I am of opinion that he would receive a fair trial in Kildare."

This is the affidavit of Mr. White—a most guarded document. What does it admit? What does it not deny? It does not deny that the Plan of Campaign was put in force on the Clongorey estate; that the management of the estate and the action of the officials were denounced in violent terms at meetings held by the National League; and it does not admit or deny that the Evicted Tenant's Fund was largely subscribed to in Kildare. The evicted tenants would, of course, as was admitted by the Attorney-General, include the Clongorey tenants. However, I do not attach very much importance to the fact that the Evicted Tenants' Fund was largely subscribed to in Kildare, and I do not take into consideration what was stated with reference to the burning of the hut or the houghing of the cattle. These are pending matters, proper, no doubt, to be submitted in all their circumstances to the Judge of Assize before he charges the Grand Jury; but they are not, however, from their unascertained character, such matters as should influence us on the present motion; but I do attach importance to the fact that the Plan of Campaign was put in force on the Clongorey estate, that evictions took place, that houses were levelled, that meetings were held there by the National League, and that the conduct of the trustees and officials was denounced in violent terms.

I come now to what I consider a very important factor with reference to this application, and that is the 7th paragraph of the Crown Solicitor's affidavit—the affidavit which was made to resist this motion. Mr. White states in that paragraph that, having regard to the prisoner's right to challenge twenty persons, and to the Crown Solicitors' rule that persons in the district of Clongorey may and ought to be directed to stand aside, he is of opinion that the prisoner will receive a fair trial. According to Mr. White an impartial trial depends upon the application of the Crown Solicitors' rule. That rule, he says, ought to be applied. Therefore, according to him, the conditions exist which make its application imperative. Let us see what they are. The wording of the relevant portion of the rule is as follows:—"In all cases of *peculiar local excitement* in any particular town or district of the county it will be prudent, if the panel permit, to set aside all persons returned from such locality." This is the rule which is stated to be applicable. It is, therefore upon the admission of the Crown Solicitor, a case of peculiar local excitement. The remedy is stated to be that jurors from the district are to be set aside. But what is the "district"? How is it defined? Will the panel permit? Nothing could be more vague. The district is wholly undefined, and the elimination of tainted jurors is absolutely uncertain.

But this statement of Mr. White, most guardedly and conscientiously made, carries with it a peculiar significance, when we bear in mind the distinct statement of the solicitor for the prisoner that in his belief the prisoner would not receive a fair trial in Kildare. Mr. Lanphier, the solicitor for the prisoner, says, in the affidavit made by him in Kildare to ground the motion for the postponement of the trial—

> "I am advised and believe, and humbly and respectfully submit, that from the excited state of feeling in this county amongst the class of persons who are summoned as jurors, which I myself know to exist from frequent communications with numbers of them since December last, the prisoner would not receive a fair and impartial trial."

To the same effect is the additional affidavit he made for the purposes of this motion. How, then, does the Crown Solicitor meet these important statements? Not by a statement of his belief that a fair trial can be had in Kildare, but by the statement I have read as to the prisoner's right to challenge, and as to the provisions of the Crown Solicitors' rule.

That a prejudice exists is practically admitted, but it is said that it can be obviated by the prisoner being right in his challenges, and by the Crown Solicitor being right in his determination of what is called "the district." But where a probability of the existence of prejudice to a substantial extent is established in relation to a county, is it to be said that the fair trial of a subject in that county is to be allowed to depend upon what might prove to be the mistaken though honest exercise of the power of the Crown to set jurors aside? I think not. A distinguished countryman of ours said that "prejudice has neither ears nor eyes for fair discussion; it accepts assertion as proof, and to refute is only to exasperate it." In my opinion when such a probability of prejudice is proved to exist this Court should not, in the exercise of its discretion, allow the fair trial of a prisoner to depend upon the action of the Crown, however highminded and honourable the officials of the Crown may be.

It was said by the Attorney-General in his very fair argument—we were glad to have his assistance—that there was not in the affidavits made upon behalf of the prisoner a sufficient foundation of facts laid to warrant us in changing the place of trial. This certainly was an observation well worthy consideration. Perhaps the statement of fact is not very full, but it is in my opinion substantial. It is proved that the Plan of Campaign was put in force on the Clongorey estate, that evictions took place, that houses were burned to prevent the evicted tenants retaking possession of them, that some of the tenants are now living on adjoining farms, that some have emigrated, and others are living in towns and villages in Kildare, that meetings were held, and intemperate and violent speeches were made. Besides, Mr. Lanphier more than once distinctly states that he knows from communications he has had with the class from which jurors are drawn that an excited state of feeling exists among them. This, in my opinion, is a fairly substantial foundation of fact; but we have besides all this what I think I am justified in describing as the practical admission of the Crown Solicitor. I might refer to what Chief Justice Lefroy, said in the *Queen* v. *Conway* (1).

> "The test is a test which applies not to the whole, but only to a part of the panel. The law says, if there be any considerable portion (and these are the words of Abbott, C.J., and Lords Denman and Campbell, C.Js.), if there be any considerable portion of the panel which might reasonably be suspected of prejudice, then and in such case the panel itself stands upon grounds such as to make it the duty of the Court to remove the trial for the purpose of having a fair and impartial trial."

In my opinion, when the panel in this case is framed, prejudice will exist to a considerable extent amongst the jurors who will constitute the panel.

The observations made by the late Mr. Justice O'Brien, in the case of *The Queen* v. *Duggan* (2) seem to me to be especially apposite. He said, in giving judgment in that case—

> "In the case of *The King* v. *Hunt* (3 B. & Ald. 444) the same objection was made as has been now taken, viz. that there were no facts specifically stated in the affidavits; but in delivering judgment the Court sets forth the ground upon which their decision was based—and it was this, That upon the affidavits it did appear that if the trial took place in the county of Lancaster it might possibly happen that persons might be summoned on the jury whose opinions might be tainted with very strong prejudice, but it would nevertheless not be competent for the defendant to challenge. This is a clear and distinct authority overruling the doctrine in *The King* v. *Harris* (3 Burr. 1330), that specific facts should be stated in the affidavit. Here the Court held it unnecessary, and the application was granted."

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(1) 7 Ir. C. L. R. 538.

(2) Ir. R. 7 C. L. 97.

We are all of opinion that the writ of *certiorari* should be granted.

O'Brien, Holmes, and Gibson, JJ., concurred.

Solicitor for applicant: *W. A. Lanphier.*
Solicitor for the Crown: *W. Grove White.*

A. E. R. J.

GOODCHILD v. DUNCAN AND SON (1).

(1895. No. 125.)

Q. B. Div.
1895.
Feb. 15.

Practice—R. S. C., Order XIV., Rule 1—Final judgment motion—Difficult question in law—Difficult questions of fact—Fraud.

Liberty to mark final judgment on a specially indorsed writ may not be given where difficult questions of fact or difficult questions in law are at issue.

Motion for final judgment, under R. S. C., Order XIV., on writ specially indorsed with a claim for recovery of possession of certain premises in or near the town of Baltimore, held by defendants as weekly tenants of the plaintiff, under an agreement dated the 1st August, 1893, which tenancy had been duly determined by notice to quit.

The facts, and allegations of fact, appearing upon the affidavits filed to support or to resist the motion so far as material to show the issues raised in the case were these:—

The plaintiff held, as tenant from year to year from Lord Carbery, certain premises near the town of Baltimore of which the premises now in question formed portion. On the 1st November, 1892, Lord Carbery served on the plaintiff a notice to quit. The plaintiff applied to the Land Commission to have a fair rent fixed on his holding. On the 25th May, 1893, the Sub-Commission dismissed the plaintiff's originating notice on the ground that the plaintiff was not *bona fide* in occupation. The plaintiff having appealed, the case came first before the Land Commission on the

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(1) Before Sir P. O'Brien, C.J., and O'Brien, Johnson, and Madden, JJ.

8th May, 1894, when on the plaintiff's application the case was adjourned, and subsequently on the 13th June, 1894, when the order of the Sub-Commission was affirmed. On the 23rd October, 1894, Lord Carbery obtained a civil-bill decree for possession on foot of the notice to quit of the 1st November, 1892. On the assumption that this decree had abated owing to Lord Carbery's death, fresh proceedings were taken on the part of his representatives for recovery of possession.

The defendants had been from 1889 to the 1st August, 1893, yearly tenants of the plaintiff of a portion of his holding at £11 per annum. On the 1st August the defendants signed an agreement with the plaintiff by which they agreed to take as weekly tenants the space as now occupied by them at the weekly rent of 4*s*. 3*d*., the tenancy to be determinable on one week's notice in writing.

The defendants' manager, James Rigby, deposed that, being in Baltimore in the summer of 1894, the plaintiff told him that he had applied to have a fair rent fixed, but had failed because the defendants were yearly tenants, and asked whether the defendants would consent to sign an agreement for a weekly tenancy in order that the plaintiff might be able to apply again for a fair rent; that the plaintiff stated that if defendants signed the agreement their doing so would not in any way alter the terms of their tenancy, as he only wanted the agreement to produce in Court and so get a reduction, and that he undertook not to disturb the defendants in their tenancy; that, relying on the plaintiff's statements, the defendants signed the agreement of the 1st August, 1893, but continued paying the rent quarterly as theretofore; that when the defendants signed the said agreement they were ignorant that the plaintiff's term had expired; and that since the defendants had ascertained the true facts of the case they had refused to acknowledge plaintiff's title and were willing to become tenants of the head landlord. The deponent referred to the following letter:—

JOHN GOODCHILD, Grocer, &c., Baltimore.

15 *July*, 1893.

TO MR. JAMES RIGBY.

DEAR SIR,—Yours of 12th instant to hand. In reply I beg to inform you that I do not intend, nor did I even form the idea of putting you to any inconvenience whatever. The hallucination under which you labour is the fact that, as you place no confidence in me, I am presumably inclined to deal unfairly by you. As I have before explained, I want to have you sign your name to a new weekly agreement in order to save myself from the consequences of subletting. Any time before the end of this month will be sufficient time to affix your names, but, as a preliminary, please state definitely if you are intended to so sign your names. The fact of your doing so will not in the least affect your tenancy or contract the time of your tenancy, my object being to be able to produce when called upon the new agreement in question when the fair rent of farm will be fixed.

I will be in a position to dictate terms to the landlord, but you need not be apprehensive of being taken advantage of by me.

Reply as soon as possible.

Yours truly,
J. Goodchild.

Seymour Bushe, *Q.C.* (*Sheehan* with him), for the plaintiff:—

Even admitting the statements made by the defendants, and assuming fraud on the plaintiff's part, the plaintiff is still entitled to judgment. The defendants have no defence. The agreement of the 1st August, 1893, precluded them from disputing the plaintiff's title. It is they who must first rely on their own fraud as a defence to their written agreement. [Sir P. O'Brien, C.J., referred to *Crawford* v. *Gillmor* (1), and Johnson, J., mentioned *Jones* v. *Stone* (2).] Both parties are *in pari delicto*, and we have the document.

George Wright, *Q.C.*, and *P. Sullivan*, for the defendants:—

Final judgment on summary motion has never been granted where a question of fraud is at issue between the parties. The plaintiff has been guilty of fraud, not only on the Land Commission, but on the defendants also. The defendants are still yearly tenants and can plead as such; they can also plead a collateral agreement to that of the 1st August, 1893. They are not estopped from denying that the plaintiff's term expired by the notice to quit in 1892: *Delmege* v. *Mullins* (3); *Fenner* v. *Duplock* (4). The plaintiff not being *bona fide* in occupation, and the tenancy being (as the head landlord contended before

(1) 30 L. R. Ir. 238.
(2) [1894] A. C. 122.
(3) Ir. R. 9 C. L. 209.
(4) 2 Bing. 10.

the Commission) a town park, the plaintiff has no *status* whatever: *Boyd* v. *Phelan* (1). The defendants rely upon this, and also on the decree of the 23rd October, 1894, as still in existence (though perhaps unenforceable) and binding on the plaintiff as an estoppel. The action is plainly unsustainable.

Sheehan, in reply.

SIR P. O'BRIEN, C. J. :—

This case has been argued at considerable length, and I do not think anything that has been said by counsel upon either side was not relevant to the question before us, and, having said this, I may quote from the case of *Crawford* v. *Gillmor* (2), to which I referred, and in reference to which my brother Johnson has stated that the event of the trial before him, which resulted in a verdict for the defendant, entirely vindicated the views of the Court of Appeal in refusing to give judgment for the plaintiff on a motion for final judgment. Lord Justice Barry said in that case :—"I am of opinion (as the Lord Chief Justice has pointed out) the mere length of time which has been occupied by the argument in this case, and I do not think one moment of our time has been occupied unnecessarily, shows that it does not come within the rule which allows final judgment to be marked on motion." The case of *Crawford* v. *Gillmor* (2), which is not referred to in the books of practice, was an important one with reference to these motions for final judgment. I was a party to that judgment, and was greatly exercised during the argument by the case of *Lloyd* v. *Byrne* (3), decided by the Court of Appeal. In the latter case final judgment was granted in the Court of Appeal, reversing the decision of Andrews, J., in the Exchequer, though points of law of very considerable difficulty arose; but I think that the point that the case was of such difficulty that the motion for final judgment should not be entertained was not made in the argument of *Lloyd* v. *Byrne* (3) in the Court of Appeal, and we distinguished *Lloyd* v. *Byrne* (3) on that ground. I have referred to what Barry, L.J., said in

(1) 14 L. R. Ir. 232. (2) 30 L. R. Ir. 238. (3) 22 L. R. Ir. 269, 274.

Crawford v. *Gillmor* (1), and I find that I am reported to have said (page 245):—"I should like to say a word as to *Lloyd* v. *Byrne* (2). I was not a party to that decision. It was a case where a question of much difficulty in law undoubtedly arose, and was decided in this Court on a motion for final judgment. But counsel for the defendant did not make in the Court of Appeal, though they did in the Court below, the point that, by reason of the legal difficulties existing in the case, the motion should be refused. It may be that when the parties were before the Court of Appeal they wished to have its decision on the difficult question of law involved in the case." Then I go on to say:—"I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises." And in the same case Lord Ashbourne says:—"The rule allowing final judgment to be marked on motion was not intended to limit or preclude a defendant from raising fair legal topics on which he *bona fide* relies, or from having the facts of his case, when complicated, or involving difficult questions, put in proper train for accurate investigation," that is, before a jury. There is also the case to which my brother Johnson has referred me, *Jones* v. *Stone* (3). In the latter case Lord Halsbury, in delivering the judgment of the Privy Council, after referring to Order XIV., which is identical in its terms with our order, says:—"The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."

I now come to the facts of this case. It was contended that the case was complicated by many questions of considerable difficulty. There was, amongst others, the effect of the decree obtained in October, 1894. I do not myself attach much importance to that. I think the real point of the case is what was so well put by Mr. Sheehan in his clear argument, viz. the difficulty arising in reference to the agreement of the 1st

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(1) 30 L. R. Ir. 238. (2) 22 L. R. Ir. 269, 274. (3) [1894] A. C. 122.

August, 1893. I think there are serious difficulties connected with that agreement. The notice to quit had been served, that agreement had been entered into undoubtedly purporting to make these gentlemen weekly tenants, and then came the all-important letter of the 15th July, 1893. [His Lordship read the letter and continued.] Well, I think that that letter raises such serious difficulties in point of law that we should not grant the motion; but having regard to all the circumstances of the case, we think that the costs of the motion, that is, the defendants' costs, should abide the result of the trial.

O'BRIEN, JOHNSON, and MADDEN, JJ., concurred.

Solicitor for the plaintiff: *O'Donovan.*
Solicitor for the defendants: *Downes.*

A. E. R. J.

Q. B. Div.
1894.
Dec. 20.

HARTY *v.* BOURKE (1).

(1894. No. 11,015.)

Practice—Writ of summons—Indorsement of excessive claim for costs—Setting aside—Costs—R. S. C., Order III., Rule 7.

In setting aside a writ irregularly indorsed with an excessive claim for costs the Court may, having regard to the circumstances, refuse to award the costs of the motion to the defendant.

Harbison v. *M'Larnon* ([1894] 2 Ir. R. 682) distinguished.

MOTION to set aside the writ of summons in this action as irregular, same being indorsed with an excessive sum for costs, and for the costs of this application. The writ purported to be specially indorsed with a claim for £20 money paid, &c., "and £1 10*s*. for costs."

C. Doyle, for the defendant:—

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(1) Before HARRISON, HOLMES, and MADDEN, JJ.

The writ must be set aside with costs: *Harbison* v. *M'Larnon* (1).

D. F. Browne, for the plaintiff:—

In this case costs should not be given. The defendant's solicitor accepted service of the writ and indorsed on the writ an undertaking to enter an appearance. It is thus evident that he intended to defend the action, and that he could not have been prejudiced.

C. Doyle:—

The appearance was "without prejudice" to this motion.

Harrison, J.:—

We think that the facts take this case out of the ordinary rule and that there should be no costs. We give leave to amend and re-serve the writ.

Holmes, J.:—

It is to be observed that the defendant in this case could not have been misled by the mistake.

Madden, J.:—

I concur.

Solicitor for defendant: *James Coffey*.
Solicitor for plaintiff: *Stephen Hastings*.

A. E. R. J.

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(1) [1894] 2 Ir. R. 682.

Appeal.
1894.
June 22.
1895.
Feb. 13.

TODD *v.* M'KEEVIR (1).

Practice—Interpleader—Summoning order—Sheriff's costs.

When the sheriff obtains a summoning order in interpleader, and the claim by the third party fails, the sheriff is entitled to have his costs of the order against the execution creditor, and the execution creditor has his remedy for them over against the unsuccessful claimant.

M'Cann v. *Birch* (2 L. R. Ir. 500) overruled. The former practice of the Exchequer Division adopted.

Appeal, by the sheriff of the city and county of Londonderry, from so much of the order of the Queen's Bench Division dated May 4, 1894, as refused him the costs of a summoning order obtained by him on January 22, 1894.

On May 11, 1893, a writ of *fi. fa.* was issued out of the Queen's Bench Division in this action, and directed to the sheriff of the city and county of Londonderry, directing him to levy the sum of £55 5*s.* 1*d.* of the defendant's goods.

On January 11, 1894, the sheriff under this writ seized certain goods which he believed belonged to the defendant, but which were forthwith claimed by the defendant's brother, Michael M'Keevir, under a bill of sale.

On January 22, 1894, the sheriff obtained an interpleader order, by which an issue was directed to try the property in the goods seized, and liberty was given to the sheriff to deliver the goods to the claimant upon receiving sufficient security, and in default thereof to sell the same and bring the proceeds into Court. When the sheriff was applying for this order his counsel asked for costs, but the Judge refused to make any order as to costs for the present, without prejudice to any application which the sheriff might make after the return of the issue.

The issue was found in favour of the plaintiff, Todd, who thereupon moved for an order that the sheriff should proceed to sell the chattels seized by him under the writ of *fi. fa.*, or a competent part thereof, and should out of the proceeds of such sale pay the amount due to the plaintiff on foot of the said writ, and that the claimant should pay to the plaintiff the costs of and incidental to the interpleader issue, when taxed and ascertained, including the costs of the application.

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(1) Before Walker, C., Palles, C.B., and FitzGibbon and Barry, L.JJ.

On this motion the Court, having heard counsel both for the claimant and the sheriff, who again applied for his costs, made the following order (dated May 4, 1894):—"That the finding of the jury and the proceedings in the said interpleader issue be entered up of record pursuant to the statute, and that Michael M'Keevir the claimant (plaintiff in said issue) do pay to the said R. H. Todd (the defendant in the said issue) the plaintiff in this action his costs by him properly and necessarily incurred of the interpleader issue order of January 22, 1894, the costs of this motion, and the costs of said issue, and all costs necessarily incurred by the said R. H. Todd in respect of such proceedings, and that it be referred to the proper officer to tax, ascertain, and certify the same, and that the said Michael M'Keevir do pay to the sheriff the sum of £2 10*s.* for costs and expenses of detention rendered necessary by reason of his claim." The Queen's Bench Division thus refused (following the hitherto usual practice) to give the sheriff his costs of obtaining the interpleader order, or of any subsequent proceedings.

The sheriff appealed from this decision.

Campbell, Q.C., and *Gaussen*, for the sheriff:—

Smith v. *Darlow* (1) finally settles the right of the sheriff to the costs of obtaining the summoning order in England, where Order LVII., Rule 15, is identical with Order LVII., Rule 15, in this country. This Order now regulates interpleader procedure, as the Interpleader Act (9 & 10 Vict. c. 64) has been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19). Under the Interpleader Act, sect. 6, the costs were in the discretion of the Court. Formerly the Court of Exchequer allowed the sheriff these costs, but the other Common Law Courts refused them. On the passing of the Judicature Act the Exchequer Division waived

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(1) 26 Ch. Div. 605.

Appeal. 1894.

TODD *v.* M'KEEVIR.

their practice for the sake of uniformity: *M'Cann* v. *Birch* (1). But the old Exchequer practice was the right rule; it was based on the practice of the Courts of Equity in interpleader. [They cited also, *Searle* v. *Matthews* (2); *Goodman* v. *Blake* (3); *Ex parte Streeter; In re Morris* (4); *The City of Manchester* (5); *Bowyer* v. *Blair* (6); *Child* v. *Mann* (7); *Purcell* v. *Healy* (8); *Hale* v. *Saloon Omnibus Co.* (9).]

A. Todd, for the plaintiff, and

Osborne, for the claimant:—

There is no reason why the usual practice should be changed: the words of Order LVII. Rule 15, are practically the same as those of the Interpleader Act dealing with the sheriff's costs.

Cur. adv. vult.

1895. Feb. 13.

WALKER, C:—

The sheriff by his appeal claims an order against the plaintiff, the judgment creditor, for the amount of his costs and expenses in connexion with an interpleader summons, leaving to the judgment creditor a remedy over against the unsuccessful claimant. The appeal therefore involves a question of very considerable importance in the practice of the Court, viz. what are the sheriff's strict rights as to costs and expenses in interpleader proceedings?

It does not appear to me that there is any substantial distinction between the words of Order LVII., Rule 15, which says:—"The Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable," and the words of the Interpleader Act, "the costs of all such proceedings shall be in the discretion of the Court or any Judge thereof" (9 & 10 Vict. c. 64 s. 6). For many years the Courts of Queen's Bench and Common Pleas on the one hand, and the Court of Exchequer on the other hand, adopted different practices in awarding the costs thus placed

(1) 2 L. R. Ir. 500.
(2) 19 Q. B. Div. 77, n.
(3) *Ibid.* 77.
(4) 19 Ch. Div. 216.
(5) 5 P. D. 221.
(6) Fl. & Kelly, 586.
(7) L. R. 3 Eq. 806.
(8) 28 Ir. L. T. R. 7.
(9) 4 Drew. 492.

in their discretion by the Interpleader Act. However, in *M'Cann* v. *Birch* (1), the Exchequer Division, having regard to the policy of the Judicature Act, gave way, and adopted the practice of the other Divisions. This appeal having now raised anew and for the first time in this Court the question as to which of the two practices in such matters is right, it must now be definitely decided, and our decision when pronounced will settle a uniform practice to be adopted in all Divisions of the Court.

If we look for guidance to the English Rules and practice we find that the English Order LVII., Rule 15, is the same as the Irish Rule. Further, the English practice has been definitely settled by the Court of Appeal in *Smith* v. *Darlow* (2), where (at p. 611) Cotton, L.J., says:—"We have consulted the other Judges and some of the officers of the Queen's Bench Division, and we find that they consider the rule to be, and we think it a reasonable rule, that the sheriff is entitled to be made safe; that he has a right to say to the person who put him in motion 'pay me the amount of my proper charges.' The strict form of order therefore would be, where a claim by a third party fails, that the charges should be paid in the first instance by the execution creditor to the sheriff, and that the creditor should have them over against the third party. But we are told that frequently the sheriff does not require the strict form of order to be made, and that the form of order which Mr. Justice Chitty has adopted is more common than the strict form of order. Here, however, the sheriff asked for an order which practically comes to the same thing as the strict form of order which I have mentioned. I think that he is entitled to it, and that the execution creditor must be ordered to pay the amount in dispute with a remedy over against the claimant." Before giving our decision in this case we thought it desirable to confer with some of the other Judges, and we consulted with the Lord Chief Justice and the Master of the Rolls. Having thus given the matter full consideration we have come to the conclusion that the view of the Court of Appeal in *Smith* v. *Darlow* (2), is consistent with justice; and for this reason and also because it is desirable to preserve uniformity of practice on the same subject

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(1) 2 L. R. Ir. 500.

(2) 26 Ch. Div. 605.

Appeal.
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M'Keevir.

in the two countries where the rules are the same, we have decided to adopt the English practice as settled in *Smith* v. *Darlow* (1). The rule made on the subject of the sheriff's costs and expenses in that case will therefore be henceforth followed in all branches of the Court. Accordingly we allow the appeal, but, seeing that a new practice is being introduced by our decision, without costs.

Palles, C.B. :—

The order made on this appeal will put an end to a controversy which has existed since 1847, and will establish a new and uniform practice for all the Divisions. Shortly after the Interpleader Act was passed the question arose as to the mode in which the sheriff's costs in interpleader should be dealt with. Previous to that Act it had been the doctrine in equity that whenever a person was entitled to interplead he should be indemnified against costs. When the Common Law Courts came to apply the principles of interpleader, they extended that doctrine in its integrity to all stakeholders whose rights were provided for by the first section of the Interpleader Act, and so far the Equity and Common Law Courts maintained a uniform practice. The 6th section of the Act enabled a sheriff to apply for an interpleader issue in a case of conflicting claims to goods which he had seized, and one would have thought that where the Common Law Courts considered the sheriff entitled to this relief, they would also have deemed him entitled to a full indemnity for his costs out of the subject-matter in dispute, with a remedy over to the person who paid him as against the unsuccessful party. But the jealousy of the Common Law Courts towards the sheriffs, which can be traced back through a long period in the history of the law, led to a different rule being laid down as regards them when they applied for an interpleader issue. The *ratio decidendi* applied to a sheriff was that he was bound on his own responsibility to determine whose the goods were: that the Act was one in relief of sheriffs, and that they should pay the expenses of obtaining the relief to which they were entitled under the Act for the first time. It seemed to have been forgotten that the Act did two things: first, it extended to the Common Law

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(1) 26 Ch. Div. 605.

Courts the jurisdiction to determine the right to the relief of interpleader; and, secondly, it extended the class entitled to the benefit of interpleader beyond that which, according to the doctrines of the Courts of Equity, was entitled to apply for it. It necessarily followed that when the Legislature declared the extended class entitled to the benefit of interpleader, the advantage which they so statutably acquired included the same rights as attached to that doctrine in the Courts where it prevailed, and amongst the rest, the right to indemnity from costs. In fact, the relief would not have been complete if it did not carry with it the right to the costs. The Common Law doctrine prevailed in many Courts in England; and on the Act having been passed for Ireland some years after its provisions had been introduced into England, the question arose as to whether the Common Law doctrine was to prevail in this country. The Courts of Queen's Bench and Common Pleas determined that they would not give the sheriff his costs of obtaining the interpleader order. The Court of Exchequer on the other hand thought the sheriff was entitled to these costs, and gave them to him. So the matter remained until the passing of the Judicature Act. After the passing of this statute the Common Law Judges were extremely anxious, as far as they could in matters of practice within their discretion, to establish a uniform practice in all the Divisions in reference to some few matters as to which, theretofore, there had been a difference in practice, and amongst others, as to this question of sheriff's costs in interpleader. The result was that with the full concurrence of my colleagues who were then the Judges of the Exchequer Division, although we all strongly adhered to the opinion that the Exchequer practice was the correct one, we thought it more decorous to give in to the practice of the greater number of the Common Law Divisions, and in *M'Cann* v. *Birch* (1) we decided to change our own practice so as to make it conform with that of the Queen's Bench and Common Pleas Divisions, giving to any party who thought himself aggrieved by the change of practice the right to come to the Court of Appeal. Some fifteen years have elapsed since this change of practice and the question is now for the first time raised in this Court. In the interval the matter came before the English Court of Appeal and it has been conclusively settled in that country what the proper form of order is. In *Smith* v. *Darlow* (1) the Court of Appeal applied the doctrine acted on by Courts of Equity prior to the passing of the Interpleader Act to every case of interpleader within that Act. I heartily agree with the suggestion that we should follow the English decision, which, in my opinion, brings back the practice as to sheriff's costs in interpleader cases to a rule which is not only uniform but the only rational one.

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(1) 2 L. R. Ir. 500.

FITZ GIBBON, and BARRY, L.JJ., concurred.

The curial part of the order of the Court of Appeal was as follows:—

> "IT is ordered that the said order of the Queen's Bench Division, dated 4th day of May, 1894, so far as the same is appealed against, be varied by declaring that in the events which have happened the said sheriff is entitled that his costs properly and necessarily incurred in obtaining the interpleader order herein, dated the 22nd day of January, 1894, and of the proceedings had in pursuance of the said order, should be provided for, and accordingly it is ordered that the said plaintiff do pay to the said sheriff the amount of his said costs and expenses; and it is further ordered that on the amount thereof being so paid by the plaintiff to the said sheriff, the said Michael M'Keevir do pay to the plaintiff the amount so paid by the plaintiff to the said sheriff for his costs and expenses, and that the plaintiff do have a remedy over against the said Michael M'Keevir for the amount so paid by him to the sheriff for costs and expenses; and, subject to the foregoing variation, it is ordered that the said order of the Queen's Bench Division, dated the 4th day of May, 1894, do stand affirmed; and it is further ordered that the appellant and respondent respectively do abide their own costs of this appeal."

Solicitor for the sheriff: *G. V. Craig.*
Solicitor for the plaintiff: *R. H. Todd.*
Solicitor for the claimant: *Hamilton.*

G. Y. D.

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(1) 26 Ch. Div. 605.

CHEEVERS, Tenant; FALLON, Landlord (1).

Appeal.
1894.
Nov. 18.
Dec. 18.

Land Law Act, 1881—*Demesne land—Severance of portion of the demesne—User as agricultural land for over fifty years.*

By lease, dated the 14th November, 1788, W. D. demised to H. S. "the house, offices, and demesne of P., with the farm and lands of G.," containing 156a. 2r. Irish plantation measure, for three lives, with a covenant for perpetual renewal. This lease was renewed, and the lessee's interest became vested in C., the tenant.

By sub-lease, dated the 21st November, 1794, portion of these lands were demised by H. S. (the lessee) to W. D. (the lessor), described as "The farm and lands of C., and part of G., otherwise P., and now called Fairy Hill," containing 83 acres, for three lives, with a covenant for perpetual renewal, at the rent of £100 5*s*. This lease was renewed, and subsequently became vested in C., the tenant.

By sub-lease, dated the 6th May, 1805, portion of these lands were demised by W. D. to H. D., for three lives, with a covenant for perpetual renewal, at the rent of £26 1*s*., and this portion of the lands were described as "That part of the demesne of Fairy Hill, . . . bounded on one side by the high road leading from P. to E., on another side by the road or avenue from the said high road to the house of Fairy Hill, on another side by the said demesne of Fairy Hill," containing 19a. 0r. 21p. Irish plantation measure. The lease contained a covenant not to build any house or cabin on that part of the demised premises adjoining the said road or avenue leading from said high road to the said house of Fairy Hill, nor within fifty yards thereof.

The lease having subsequently, by eviction or otherwise, become extinguished, T. D. (the successor in title of W. D.), by lease dated the 9th Oct., 1840, demised this holding of 19a. 0a. 21p. to J. F. for three lives, with a covenant for perpetual renewal, at the rent of £16. The lands were described in the same way as in the lease of the 6th May, 1805, and the lease contained the same covenants. On the 24th October, 1846, J. F. made a lease to a tenant for ten years, at £44 1*s*. 5*d*., and after its expiration the holding was let to different tenants, and finally, on the 23rd May, 1880, C. entered into an agreement with F. to become yearly tenant of the 19a. 0r. 21p., at a rent of £1 17*s*. 6*d*. an acre, and agreed not to break up or conacre any part of the holding. C. had previously acquired the interest under the lease of the 14th

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(1) Before Walker, C., Sir Peter O'Brien, C.J., and FitzGibbon and Barry, L.JJ.

May, 1788, and he subsequently acquired the interest under the lease of the 21st November, 1794, and on these portions of the lands the mansion-house stood, in which he resided. He was a gentleman of good social position, and worked all the lands together:—

Held (reversing the decision of the Land Commission, FitzGibbon, L.J., *dissentiente*), that the 19A. 0R. 21P. had become detached from the other portion of the demesne of Fairy Hill by the leases of 1805 and 1840, and had become undemesned.

The tenant George Cheevers held the lands under an agreement dated the 23rd May, 1880, with John Fallon (the father of Mary Fallon, the present landlady) in the following terms:—"I hereby propose and agree to pay you the yearly rent of £1 17*s.* 6*d.* per acre, for each and every acre of the lands called little Willmount or Fairy Hill, situate near the town of Portumna, and lately occupied by John S. Clarke; said lands contain 19 acres and 21 perches Irish measure, with slated shed thereon, all of which said premises are situate in the parish of Lickmolassy, Barony of Longford, and county of Galway. I agree to become yearly tenant to said premises from the 1st day of May last, 1880, and, in addition to the acreable rent of £1 17*s.* 6*d*, I agree to pay the usual taxes between landlord and tenant, namely one half the poor rates, the entire of the county cess. The rent I agree to pay half-yearly on every 1st day of May, and 1st day of November, in each year, the first half-year's rent to be paid on the 1st November, 1880, and I agree not to break up or conacre any part of said lands during my tenancy without the previous consent in writing first had and obtained from you, under a penalty of £2 additional per acre over and above the acreable rent of £1 17*s.* 6*d.*, and I agree to give up said premises determinable by the usual six months' notice in the same order, repair, and condition in which they now are."

This portion of the lands of Fairy Hill so held by George Cheevers formed portion of a larger grant of the said lands, the title to which was as follows:—

By indenture dated the 14th November, 1788, William Doolan demised to Henry Shobridge the lands of Pokoroko, containing 156A. 2R., for three lives with a covenant for perpetual renewal, subject to the rent of £113 Irish currency, with a pepper-corn fine for renewal. The interest of William Doolan in the lands became

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vested in the Marquis of Clanricarde, and by a renewal dated the 15th November, 1878, Lord Clanricarde renewed the lease to Joseph Cunningham. Cunningham's interest was sold in the Landed Estates Court in 1886, and was purchased by George Cheevers, to whom it was conveyed on the 6th August, 1886.

By a sub-lease dated the 21st November, 1794, Henry Shobridge (the lessee in the lease of 1788) demised to William Doolan (the lessor in that lease) "all that and those the farm and lands of Cloardy and part of Goul, otherwise Pokoroko and now called Fairy Hill" containing eighty three acres, for three lives with a covenant for perpetual renewal at a pepper-corn fine for renewal at the yearly rent of £100 5*s*. This lease was renewed by indenture dated the 4th June, 1830, from Henry Shobridge to John Doolan. William Doolan's interest in this lease became vested in L. F. Goodbody, and his interest having been sold in the Landed Estates Court was purchased by George Cheevers, to whom it was conveyed by indenture dated the 29th June, 1877.

By a sub-lease dated the 6th of May, 1805, William Doolan demised to Henry Dolphin, portion of the lands of Fairy Hill, containing 19a. 0r. 21p. Irish, for three lives, with a covenant for perpetual renewal, at the rent of £26 1*s*. This lease was renewed on the 19th January, 1831, but the lessee's interest in it came back to the Doolan family before 1840. On the 9th October, 1840, Thomas Doolan (the successor of Wm. Doolan), in consideration of a fine of £110, demised to John Fallon the same 19 acres, described as "all that and those that part of the demesne of Fairy Hill, in as full and ample a manner as the same were formerly held by the late Henry Dolphin of Portumna, meared on the one side by the high road leading from Portumna to Eyrecourt, on another side by the road or avenue from said high road to the house of Fairy Hill, on another side by the said demesne of Fairy Hill formerly in the possession of William Doolan, and on the other side by the parks in the possession of William Mulhuan, Laurence Madden, and Patrick Cannon, containing 19 acres 21 perches plantation measure, together with a small angle or piece of ground adjoining the avenue gate entering into the demesne of Fairy Hill and also adjoining the lands of Gall, in the possession of Henry Shobridge," to hold for three lives, with a covenant for perpetual renewal at

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a pepper-corn fine for renewal, subject to the rent of £16 sterling. The lease contained a covenant by the lessee not to build or cause or permit to be built any sort of house or cabin "on that part of the demised premises adjoining the said road or avenue leading from said high road to the said house of Fairy Hill, nor within fifty yards thereof nor upon any part of the said piece of ground or angle adjoining the aforesaid avenue gate on lands of Gall" under penalty of payment of the penal rent of £46 3*s.* 1*d.*

On the 24th October, 1846, John Fallon made a lease of the same premises under the same description to John Martin for a term of ten years at the rent of £44 1*s.* 5*d.*, and the lease contained a covenant not to plough, break up, or convert into tillage any part of the demised land, a covenant not to cut down timber, a covenant against alienation, and a covenant against building as provided in the lease of 1840. After the expiry of Martin's lease, the lands were occupied by several persons who meadowed or grazed the land.

Colonel Cheevers was colonel of the Galway militia, he was a landed proprietor and a man in a good social position. He resided in the dwelling-house on the other part of the lands of Fairy Hill. He had always grazed or meadowed the nineteen acres, and had worked them along with the other lands which he held. On the 19th October, 1890, the originating notice was served, and the Sub-Commissioners fixed a fair rent. On appeal to the Land Commission this order was reversed, and the originating notice was dismissed, on the ground that the land was demesne land. Colonel Cheevers appealed.

Meredith, *Q.C.*, and *Cherry*, for the appellant.

Fetherstonhaugh, for the respondent.

Dec. 13.

WALKER, C.:—

This is an appeal from the Land Commission. The Sub-Commission fixed a fair rent of the holding. The originating notice is conversant with a holding of 19A. 0R. 21P., of which the appellant, Colonel Cheevers, is yearly tenant, and it was dismissed on the ground that the lands were demesne lands, or the holding not agricultural or pastoral, following the decision in *Allen* v. *Grogan* (1).

Colonel Cheevers is ocupying tenant under Mr. Fallon, who holds these same lands under a lease renewable for ever, as tenant to the same Colonel Cheevers, and Colonel Cheevers himself is tenant of them, with other lands, to the Marquis of Clanricarde, under a like lease renewable for ever. Those other lands, which are additional to the lands in the originating notice, include the house and demesne of Fairy Hill, where Colonel Cheevers resides, and it is the relation of this house and demesne of Fairy Hill to the lands in question, which creates the controversy in the present case.

The documents before us disclose the title of Lord Clanricarde as representing the head interest, and of Colonel Cheevers, under a lease from him, and, again, of Mrs. Fallon under Colonel Cheevers, and, finally, of Colonel Cheevers under Mrs. Fallon, and it will be necessary to state this title, and the description of the lands as disclosed in these documents.

By deed dated the 14th November, 1788, William Doolan, now represented by Lord Clanricarde, demised to Henry Shobridge all that and those the house, offices, and demesne of Pokoroko, otherwise Clarary, as then held by the said Henry Shobridge, with the farm and lands of Gall, or Galtimore, then in the possession of the undertenants of the said William Doolan, containing 156A. 2R. 7P., Irish plantation measure, to hold for three lives renewable for ever, at a pepper-corn fine, subject to the yearly rent of £113 Irish currency. William Doolan appears to have held the land under a lease dated the 12th March, 1747, for a term of three lives renewable during twenty-one lives, and for 999 years after the the expiration of twenty-one lives.

The interest of William Doolan was afterwards acquired by the Marquis of Clanricarde, and he renewed this lease by deed dated the 15th November, 1878. This renewal was to Joseph Cunningham, who had acquired the lessee's interest, and Cunningham's estate having been sold in the Landed Estates Court, the lessee's interest was purchased by George Cheevers, to whom a conveyance was made on the 6th August, 1886. In this conveyance the lands were described, as "the lands expressed to be demised by the said recited indenture of the 14th November, 1788, now known as part of the lands of Gowil, and part of the lands of Fairy Hill." The recital describes the lands as the house, offices, and demesne of Pokoroko, otherwise Clarary, formerly held by Henry Shobridge, with the farm and lands of Gall and Galtimore, known on the Ordnance Survey as part of the townland of Gowil, and part of the townland of Fairy Hill.

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(1) 32 L. R. Ir. 179.

Henry Shobridge, the lessee in the lease of the 14th November, 1788, made a sub-lease of part of the lands to William Doolan, on the 21st November, 1794, and by that lease he demised to William Doolan, described as of Fairy Hill, all that and those the farm and lands of Clarary and part of Gowil, otherwise Pokoroko, and now called Fairy Hill, containing 83 acres, to hold for the three lives named, and the lives of any other persons to be added successively, so as to give a perpetual interest to William Doolan, subject to the yearly rent of £100 5*s*., it being declared to be the true intent of the deed that William Doolan, his heirs and assigns, should have the same tenure of the said lands that William Doolan granted to Henry Shobridge, by lease bearing date some time in November, 1788. This lease was renewed by deed dated the 4th June, 1830.

William Doolan's interest under the lease of the 21st November, 1794, became vested in Lewis Frederick Goodbody, and his estate having been sold in the Landed Estates Court, it was purchased by George Cheevers, and was conveyed to him by deed dated the 29th June, 1877. In this conveyance the lands are described as the lands of Cloardy and part of Gowil, otherwise Pokoroko, now called Fairy Hill, containing 136A. 3R. 2P., statute measure, subject as to part of the said lands, to a lease dated the 9th of October, 1840, from Thomas Doolan to John Fallon.

William Doolan, the lessee in the lease of 1794, who was then resident at Fairy Hill, executed to Henry Dolphin, a sub-lease of part of the lands, on the 6th May, 1805, containing 19A. 0R. 21P., Irish plantation measure, to hold for three lives renewable for ever, at a pepper-corn fine, at the yearly rent of £26 1*s*. sterling. In this lease the lands are precisely the same as contained in the lease of the 9th October, 1840, which I shall after mention, and are described in precisely the same manner, and the lease contained a covenant prohibiting building, in the same terms also. This lease was renewed on the 19th January, 1831.

Either by the eviction of this lease, or in some other manner, it would seem, in the year 1832, the possession and title under it got back into the Doolan family, and on the 9th October, 1840, Thomas Doolan, the successor in title of William Doolan, made a lease to John Fallon, in consideration of a fine of £110. By this lease he demised to John Fallon, "All that and those that part of the demesne of Fairy Hill in as full and ample a manner as the same were formerly held by the late Henry Dolphin of Portumna, meared on the one side by the high road leading from Portumna to Eyre Court, on another side by the road or avenue leading from the said high road to the house at Fairy Hill, on another side by the said demesne of Fairy Hill, formerly in the possession of William Doolan, and on the other side by the parks in the possession of William Mulhuan, Laurence Madden, and Patrick Cannon, containing 19A. 0R. 21P., Irish plantation measure, together with a small angle, or piece of ground adjoining the avenue gate entering into the demesne of Fairy Hill, and also adjoining the lands of Gall, in the possession of Henry Shobridge," to hold for three lives, renewable for ever, at a pepper-corn fine, subject to the yearly rent of £16; and the said John Fallon covenanted that he would not "build, or cause or permit to be built, any sort of house or cabin of any description whatsoever, or any part of a house or cabin on that part of the hereby demised premises adjoining the said road or avenue leading from said high road to the said house of Fairy Hill, nor within 50 yards thereof, nor upon any part of the said piece of ground or angle adjoining the said avenue or gate, or land of Gall," under a penal rent.

On the 24th October, 1846, John Fallon made a lease of the same premises, under the same description, to John Martin, for a term of ten years, at the yearly rent of £44 1*s.* 5*d.*; and John Martin covenanted that he would not, at any time, plough, break up, or convert into tillage, or use otherwise than as meadow or pasture land, any part of the demised premises, and would not cut down any timber, tree, or sapling likely to become timber, also

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not to assign or let, and not to build any house or cabin, as provided by the lease of 1840. After Martin's tenancy expired, the lands in question were occupied by several persons who appear to have meadowed or grazed them, the last occupier being a man named Clarke.

On the 23rd May, 1880, Cheevers, then the owner of Fairy Hill, under the Landed Estates Court's conveyance of 1877, agreed to take from John Fallon the lands comprised in the lease of 1840. This agreement, so far as material, is as follows:—"I hereby propose and agree to pay you the yearly rent of £1 17*s.* 6*d.* per acre for each and every acre of the land called Little Willmount, or Fairy Hill, situate near the town of Portumna, and lately occupied by John S. Clarke, said lands contain 19A. 0R. 21P. (Irish), with slated shed thereon. I agree to become yearly tenant, I agree not to break up or conacre any part of said lands during my tenancy, and I agree to give up said premises, determinable by the usual six months' notice, in the same order, repair, and condition in which they now are." The bulk rent would be £35 17*s.* 3*d.*

It is, I think, quite plain that that part of the demesne of Fairy Hill not comprised in the lease to Fallon of the 9th October, 1840, constitutes the demesne of Fairy Hill, in the hands of Colonel Cheevers, and the real question is—What is now the character of the severed portion, which was demised for ever by the lease of 1840, and has now got back into Colonel Cheevers' hands under the agreement of 1880?

I think it would unduly extend the doctrine of *Allen* v. *Grogan* (1) to apply it to such a case as this. The letting is comparatively recent; the lands have been used for meadow and pasture, and have been practically, from 1835 to 1880, in the hands of persons unconnected with the demesne of Fairy Hill. There is no timber on them, and they have no ornamental character. It is true they adjoin the demesne, and the approach to Fairy Hill House; and it is evident the owners of that demesne considered that building on that part of those lands which formed the outskirts of the demesne would interfere with its amenity. This is natural, and may have formed the motive which induced Colonel Cheevers to take it, but if it was not demesne land when he took it, I do not think any acts of his have made it so, or deprived it of its agricultural or pastural character.

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(1) 32 L. R. Ir. 179.

So far as regards description, the perpetual leases between Lord Clanricarde and Shobridge describe the lands of Fairy Hill as demesne. The sub-perpetual grants from Doolan to Fallon do not so describe them. The perpetual grants from Doolan to Fallon let off for ever the lands in question under the description of the demesne of Fairy Hill, and the final letting of 1880 merely calls them the lands of Little Willmount, or Fairy Hill.

We have not to consider the position between Lord Clanricarde and his immediate tenant. At all events he let them away for ever, and put it in the power of his tenant to make a like grant, which was done.

Now, we start with this, that nearly a century ago, these lands were severed from the demesne of Fairy Hill by a perpetual grant; and when, by some mode we cannot now trace, they got back again into the possession of the persons who owned Fairy Hill, those persons re-affirmed their intention to sever them for ever from the demesne of Fairy Hill by executing the lease of the 9th October, 1840, taking a fine for it. The covenant in that lease has been relied upon for the landlord. It struck me from the first that this covenant furnished an argument the other way. It seems to me equivalent to a declaration that, while the owner of Fairy Hall severs the lands from the demesne and mansion house, and puts it, *prima facie*, in the power of the grantee to interfere with the amenity of the demesne by building up the avenue, he yet, for the sake of what he retains, puts a partial restraint on the powers of his grantee, so far as regards the fringe which adjoins that retained demesne and mansion-house.

The case before us is not in my opinion like *Spencer* v. *Tedcastle* (1), which was an application under the peculiar language of the Redemption of Rent Act, the grant being one of the whole subject-matter of mansion-house and demesne. Nor is it, I think, at all like the numerous cases decided in this Court where there were leases for limited terms of the mansion-house and demesne, either expressly so described, or without any indication of an intention to undemesne, such as *Roche* v. *Rice* (1), *M'Craith* v. *Burgess* (2), *Moore* v. *Batt* (3).

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(1) 32 L. R. Ir. 411.

We have held repeatedly that undemesning is possible: it is only a question of intention to be gathered from the acts of a competent owner. I adopt the words of the Chief Baron in *Moore* v. *Batt* (3), " a clear, affirmative intention show that they shall be held or used in a manner which is inconsistent with their continuing to be demesne lands." We found that intention in *Hewson* v. *Listowel* (4), from the use contemplated and the terms of the lease. So here I think the intention appears from the instruments of 1805, 1831, and 9th January, 1840. So we found the same intention from the nature of the deeds executed, and the dropping of the use of the word " demesne " in modern deeds in *Mansfield* v. *Congreve* (5). There three deeds of 1801, 1814, and 1822, described the lands as demesne, the last being a lease for three lives or twenty-one years. We held the lands were undemesned by the facts which were that the owner had another demesne, and that in 1827 he re-settled all his property, including the lands in question, not describing them as demesne, but settling them as rent-producing property; after the lease of 1822 expired in 1847, it was let to several successive yearly tenants, and was finally let by lease to the appellant in 1857, under the description of part of the lands of Landscape, with the dwelling-house and offices thereon.

Every case must depend on its own facts, and the inferences to be deduced from them may often be differently drawn by different minds, of which the present case is an example. Upon the whole I think the order of the Land Commission should be reversed, and the case permitted to proceed upon the originating notice.

SIR PETER O'BRIEN, C.J.:—

I agree. I was not a party to the decision in *Spencer* v. *Tedcastle* (6), but I think it, as well as the other cases referred

(1) 26 Ir. L. T. R. 117.
(2) *Ibid.* 113.
(3) 32 L. R. Ir. 68.
(4) 32 L. R. Ir. 700.
(5) *Infra*, 425.
(6) 32 L. R. Ir. 411.

to, is distinguishable, for the reasons expressed by the Lord Chancellor.

Undemesning is possible. Any act by the landlord is sufficient to effect it, which shows a clear intention upon his part to do so. I assume Fairy Hill to have been a demesne; but what have we here? We have the lands let off for ever to a farmer. Sir Edward Sullivan, in *Griffin* v. *Taylor* (1), gave a definition of demesne land. "The true definition of demesne lands is lands held by the owner with the mansion-house." Here we have 19 acres let off for ever from the demesne—from that portion of the demesne which had the mansion-house upon it. In the instrument which so let it off, the lease for lives renewable for ever of the 9th October, 1840, there is a covenant that the lessee should not build any house or cabin on that part of the demised premises adjoining the road or avenue leading from the high road to the house of Fairy Hill, nor within fifty yards thereof, nor upon any part of the said piece of ground or angle adjoining the aforesaid avenue gate. This restriction was obviously introduced so that the amenity of what was retained as demesne should not be interfered with; but it was quite plain that on any other portion of what was let off, save this narrow margin, houses and cabins could be built, and it might be used in any way that an ordinary farmer might wish to use it.

Mr. Justice Bewley seems to have thought that this covenant indicated an intention not to undemesne. I think it is more consistent with a contrary view. Its operation is restricted to a narrow margin, and it implies that far the greater portion of the farm might be used for purposes inconsistent with its preservation as a portion of a demesne.

Having regard to this covenant, and to the fact that the subject-matter is let off for ever to a farmer, separated by an instrument creating a perpetual tenure from the mansion-house or landlord's residence, I think an affirmative intention to undemesne is shown, and that accordingly the judgment appealed from should be reversed.

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(1) 16 L. R. Ir. 202.

FITZ GIBBON, L.J. :—

This case is another instance of the difficulty of giving just effect to the Land Acts. What is the result of the decision? Colonel Cheevers, a gentleman of good social position, a landed proprietor, is the resident occupier of a mansion-house and demesne adjoining the holding now in dispute. It is admitted that this holding was originally part of the demesne: it is still within the "ring fence" of the demesne, and the only approach to the mansion-house runs along one side of it. It was let away to a tenant, but Colonel Cheevers took it back again, and restored it to its old use, and it is now used and occupied in identically the same way as when it was an integral part of the demesne. Yet, the result of the transaction is that he now fixes a fair rent against his own tenant, upon a holding which was expressly let to that tenant as part of the demesne of Fairy Hill, and which is now actually occupied as part of that demesne. I cannot hold such a case to come within the Land Acts unless I am compelled to do so, either by the facts or by previous decisions of this Court. I think that the facts are more consistent with giving to this holding the character of demesne land, and the previous decisions appear to me to be against Colonel Cheevers. At the same time, I admit that each of these cases must turn on its own peculiar circumstances.

We must understand the title in order to see the bearing of the other cases. The fee-simple is in Lord Clanricarde, and we have the opinion of the Lord Chief Baron that unless the land is demesne against everyone "up and down," it cannot be demesne at all; but I do not go into that question now. By the lease of November 14, 1788, William Doolan demised to Henry Shobridge for three lives 156 acres, including the house, offices, *and demesne* of Pokoroko, with a covenant for perpetual renewal. That lease drew a distinction on the face of it between "the house offices and demesne," and the other lands included in it. In 1794, six years after, the lessee of that head interest made a lease for lives renewable for ever, with a pepper-corn fine for renewal, to William Doolan, the lessor in the former lease, of 83 acres out of the 156; and these 83 acres comprised the house, office, and demesne of Pokoroko. It is true that this sub-lease of 1794 did not describe the lands as demesne land; but any argument that could be founded on that is done away with by the fact that the tenant under that very lease demised the place in 1840 as "that part of the demesne of Fairy Hill in as full and ample a manner as the same was formerly held by the late Henry Dolphin of Portumna." In 1846 Fallon, the under-tenant, again sub-let to Martin, describing the land as "part of the demesne of Fairy Hill." Therefore, he did not regard it as having been undemesned. Thus we have four distinct interests in these lands; and all the documents of title relating to the head interest, and to the two lower interests, uniformly, for more than a century, have described the land as demesne.

Colonel Cheevers' connexion with this land is important. He first purchased, in the Landed Estates Court in 1877, the middle interest for £1375, and in that conveyance the lands were not described as demesne, though, in the descriptive particulars in the rental, they were described as demesne. In 1886 he purchased the head interest under Lord Clanricarde, subject to the lease of 1794, which was in turn subject to the lease of 1840, and by the Landed Estates Court the land was then conveyed to him, *eo nomine*, as demesne. The lease of 1840 described the land as "part of the demesne of Fairy Hill, . . . bounded upon one side by the road or avenue from the high road to the house of Fairy Hill, on another side by the said demesne of Fairy Hill." Both the map and the Ordnance Survey include these 19 acres in the demesne. Furthermore, the lease of 1840 includes "the plot of ground surrounding the small angle or piece of ground adjoining the avenue gate entering into the demesne of Fairy Hill."

The covenant to preserve fifty yards all along this avenue from having any house or cabin built upon it has an opposite effect upon my mind to that which it seems to have had on the mind of the Lord Chief Justice. I regard it as a covenant pointed to preserve the amenities of the mansion-house and demesne, and *pro tanto* to restrict the use of the land along the avenue to uses suitable to demesne land. How you can preserve the amenities of the demesne, and at the same time hold that the land has lost the character of demesne land, I cannot see. This strip, fifty yards wide, seems to contain 3 or 4 acres, at least, out of the 19 acres;

and if there is no jurisdiction over that portion because it is demesne land, there is no jurisdiction to fix a fair rent upon the whole.

I need not repeat that the "demesne land" to which the exception applies need not be ornamental land; on the contrary, it must be agricultural or pastural.

How stand the authorities? We have had a great many cases in which the documents of title described the land as demesne. This is the first case in which land consistently so described has been held not to be demesne. In two only where the description occurred at all was the land held to be undemesned. In one of these, *Congreve* v. *Mansfield* (1), the description was changed, and the lands were settled as tenantable lands, more than sixty years ago; in the other, *Hewson* v. *Listowel* (2), a piece of "demesne land" was afterwards, by lease, expressly incorporated with one "entire farm" of over 1000 acres, and all the land demised was fenced in as a single agricultural holding, under a covenant in the lease.

This, I repeat, is the first case in which land consistently called demesne, before the Land Act and since, has been held to be undemesned; and this is done notwithstanding the fact that Colonel Cheevers, who is now fixing a fair rent as the occupying tenant, is himself the owner of at least one superior interest under documents which make the land "demesne" as between him and the owner in fee!

In *Orpen* v. *Fitzgerald* (3), decided in 1884, the land was let in 1853 *eo nomine* as demesne. It was contended that the term was used only for identification of the land; but Sir Edward Sullivan met that argument with these words—"These lands were let as demesne, to keep them as such."

In *Moore* v. *Batt* (4) where the land was let as the mansion-house, offices, demesne, and farm of Newgrove, the Chief Baron said:—"When lands are, as they were here, demesne-lands in the hands of an owner in fee, they cannot, in my opinion, cease to be lands of that character, unless a clear affimative intention on the part of their owner be shown that they shall be held or used in a manner which is inconsistent with their continuing to be demesne lands."

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(1) *Infra*, 425.

(2) 32 L. R. Ir. 700.

(3) Unreported.

(4) 32 L. R. Ir. 68.

In *White* v. *Johnson* (1), where the land was let in 1849 for a life, or thirty-one years, the Chief Justice said :—"The land was demesne till the date of the lease, and the lease intended it to be continued."

In *M'Craith* v. *Burgess* (2), fifty-two acres out of a holding were described as demesne in the lease, and this Court, therefore, held that the land had been let as demesne.

Roche v. *Rice* (3) comes nearest to the present case. There, there was an Incumbered Estates Court conveyance to the predecessor in title of the landlord, in which the lands were described as that part of the town and lands of Strawhall; and in the schedule the tenancy was described as "dwelling-house and demesne lands of Strawhall." The Lord Chancellor said the case was hardly arguable, that though the description of "demesne" was not to be held conclusive, yet there were reasonable and probable grounds for so describing the holding, and that, *therefore*, it was demesne land within the meaning of sect. 58, sub-sect. 2. I said that where the term "demesne" was used before the Land Acts, a demise of land as demesne might be deemed "almost conclusive."

In *Muskerry* v. *Stack* (4) because part of the land adjoined the avenue leading to Lord Muskerry's mansion-house, the holding was held to be demesne land, though not so described in the lease.

I admit that the length of the letting may be evidence of undemesning; but where the letting is, *eo nomine*, of demesne, it is almost conclusive that the character was not intended to be changed. That land let for long terms, or even in fee-farm, may be demesne, has been held by this Court; the tenure, therefore, is not conclusive. I cannot put this more clearly than the Lord Chief Justice has done in *Magner* v. *Hawkes* (5):—"In my opinion, the tenure is an element to be taken into consideration in determining whether the lands are demesne lands, and no more. In the determination of that question all the circumstances of the particular case are to be taken into consideration, the tenure, the social position of the owner, the user, past, present, and contemplated, but, above all, the physical characteristics of the subject-matter; and, once it is ascertained by regarding all these elements that any particular denomination of lands are demesne lands, they must be dealt with as such in relation to any person having an estate or interest in them, whether *owner in fee*, middleman, or sub-tenant."

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(1) Unreported.

(2) 26 Ir. L. T. R. 113.

(3) *Ibid.* 117.

(4) Unreported.

(5) 32 L. R. Ir. 297.

I shall not go over the facts of this case again; the documents call the place demesne lands all through; the social position of Colonel Cheevers, the owner and occupier of the adjoining mansion-house, speaks for itself; the past user is that the land was included in the demesne until 1840, and was then let away with restrictions upon its user to preserve the amenities of the demesne. The present user is that the land has been thrown back by Colonel Cheevers into his demesne, and he is using it now exactly as it was used before 1840. Even the document of 1880 provided that it was not to be used except for grazing or pasture. As was said by the Lord Chancellor in *Spencer* v. *Tedcastle* (1), "I do not think the length of the tenure can be relied on for the purpose of altering the character of lands otherwise excluded from the Acts."

Under these circumstances, it appears to me to be contrary to the intention of the Legislature, and contrary to the decisions of this Court, as well as repugnant to the real purpose of the Land Acts, that a party in the position of Colonel Cheevers should be treated as an agricultural tenant entitled to fix a fair rent upon part of his own estate, which he took back for the purpose of restoring it to its original use and character as demesne. If there was a severance, it was only "parenthetical," and the parenthesis came to an end in 1880.

One fact remains. In 1880 this tenancy was created; Colonel Cheevers does not come forward until 1894 to fix a fair rent on this holding which, if it was ever within the Act of 1881, was so when it passed. It took him thirteen years to discover that this land was not demesne.

For these reasons I cannot concur with the other members of the Court, and this holding, in my opinion, is excepted from the Land Act.

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(1) 32 L. R. Ir. 415.

Barry, L. J. :—

With great regret, which under similar circumstances I have expressed more than once before, I have come to the conclusion that I must hold that Colonel Cheevers is entitled to assume the position of an over-rented tenant farmer. My brother FitzGibbon feels, as I do, that the Land Act was never intended to be applied, or I may say abused, for such a purpose as to cause Colonel Cheevers, under the circumstances of this case, to be regarded as one of the class of persons which the Act was intended to benefit. But we must take care, if we refuse the benefit of the Land Act to Colonel Cheevers, lest, on a principle of practice which, in cases of mixed law and fact, has not only been adopted in argument at the bar, but has extensively prevailed in the decisions of the Courts as well in England as here, we establish a precedent which may be used hereafter for excluding in other cases from the benefit of the Act persons to whom the Act was really intended to apply.

The question, "What is demesne land?" is in itself intrinsically a mixed question of law and fact, but I may say it is now practically a question only of fact; because, in *Griffin* v. *Taylor* (1), Sir E. Sullivan gave a legal description of "demesne land," which has been adopted by this Court as being practically "a definition," so far as the question is one of law, leaving to be decided another question, which is one of pure fact, namely, whether the evidence in the case satisfies the tribunal "as jurors" that the holding fulfils *in fact* the requirements of the definition.

Much difficulty arises in the administration of the Act from following what is now pronounced by the House of Lords as an objectional and inexpedient course, namely, of deciding one case from the facts of another, as if a decision in fact was a decision in law, to be adopted as a ruling precedent. This proposition of the House of Lords is well illustrated by Mr. Justice Chitty, in the recent case of *Craignish* v. *Hewitt* (2). The question was whether there was sufficient evidence to satisfy him of an intention of change of domicile; and the counsel contended that Chitty, J.,

(1) 16 L. R. Ir. 197. (2) [1892] 3 Ch. 180.

Appeal.
1894.

CHEEVERS, *Tenant;* FALLON, *Landlord.*

Barry, L.J.

himself had, in a case resembling in facts (*In re Patience* (1)), decided that there was not sufficient evidence of intention, and that therefore he should hold the same in the case before him. In his judgment (at p. 193), Chitty, J., said:—"The plaintiff's counsel relied on the decision of *In re Patience* (1). On a question of fact, a decision in a previous case affords little or no assistance. In that case I thought there was not sufficient evidence of intention. In this case I think there is."

I think that was an extremely admirable decision, tersely expressed, and sound in every way. Sometimes we have had it vehemently argued that the fact of the documents calling the land "demesne land" was conclusive, and FitzGibbon, L.J., has rightly said that the use in the document of the designation "demesne land" *before* 1870 ought almost to be conclusive. But we have had cases here, where the land was described as "demesne land" that was not demesne land at all within the Act. In *Hewson* v. *Lord Listowel* (2), which has been referred to, a portion of the lands was for many years undoubtedly demesne lands, and they were so described in the documents; but the parties were held by their dealings with it to have simply made it agricultural, by including the portion which was originally demesne in a large new take, and thus merging it in one large farm, even although after the merger there were letters from the tenant to the landlord's agent with respect to a new lease, in which he called the portion "demesne." Where, therefore, the term "demesne land" is used, in some cases it is powerful evidence, in some cases it is conclusive, in some cases it is overborne by other evidence. In this case, in the last document (the lease of the 24th October, 1846) the holding is said to be bounded by the demesne; a thing cannot be "bounded" by itself. The portion in question of the ground had been once part of the demesne of Fairy Hill, but it was severed by a document passing it away from the owner of the demesne for ever, and how it can be said to be demesne again, when it is described as bounded by the demesne, I cannot understand. Without going over the previous cases, whether I held the holding to be demesne land or not, in those cases I exercised my judgment to

(1) 29 Ch. Div. 976.

(2) 32 L. R. Ir. 700.

the best of my ability on a question of fact; and exercising my judgment similarly in this case, I hold that this bit of ground was severed from the demesne of Fairy Hill, that in fact it is a strip of ground on the verge of the demesne, but severed from it, and free from buildings for the amenities of the demesne, but it is no longer "demesne land."

Under these circumstances, though I sympathise with the views of FitzGibbon, L. J., I feel bound to decide in favour of Colonel Cheevers. The Lord Justice said that he would not hold Colonel Cheevers to be an oppressed farmer, unless he was compelled to do so. I think I am compelled to do so, though I regret that I am—not, of course, on any personal demerits on the part of Colonel Cheevers, but on the conviction that he, and such as he, under such circumstances, were never within the contemplation of the Legislature in passing the Act of 1881.

Solicitor for the landlord: *James Brady.*
Solicitors for Colonel Cheevers: *Blake & Kenny.*

R. D. M.

MANSFIELD, Tenant; CONGREVE, Landlord (1).

Appeal.
1894.
July 18, 24.

Demesne land—Tenancy from year to year—Land formerly demesne—Undemesning.

A holding consisting of 40 acres, Irish plantation measure, and a dwelling-house and offices, were let to a tenant by lease, dated the 24th April, 1857, for twenty-one years, at the rent of £110. The lessee was a farmer, holding another farm of 90 acres within 4 miles, and the lease contained no special clauses. The landlord owned another property, which comprised a large mansion and fine demesne, about 10 miles lower down the river Suir. In some of the previous documents dealing with the property the lands were described as "the demesne of L.," and in 1822 the lands, described as demesne lands, were let by an owner in fee for three lives or twenty-one years. After the lease expired the holding was unlet for some years. It was then let to several successive yearly tenants. In 1827 it had been put in settlement along with various other denominations of land, which were let to tenants, but the settle-

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(1) Before Walker, C., and FitzGibbon and Barry, L.JJ.

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ment did not comprise the mansion-house and demesne, and did not describe the holding as demesne:—

Held **(reversing the decision of the Land Commission), that the holding had become undemesned.**

The farm in this case was held by the tenant under a tenancy from year to year after the expiration of a lease for twenty-one years, dated the 24th April, 1857. By that lease John Congreve demised to Edward Mansfield that part of the lands of Landscape then in the possession of Edward Mansfield, containing forty acres plantation measure, together with the dwelling-house and offices erected thereon, reserving to the lessor, mines, minerals, timber, and other trees, situate in the barony of Upperthird and county of Waterford for twenty-one years from the 25th March, 1856. The house was a good but old-fashioned building, and at the date of the lease was in bad repair; but the tenant expended some money in putting the buildings in repair. The total valuation of the holding was £84, which included £15 as the value of the buildings. There were no special covenants or clauses in the lease; the tenant was a farmer holding another farm of ninety acres within four miles. The Congreves were landed proprietors who owned a considerable amount of property, and they had their family seat at Mount Congreve lower down the Suir. The prior history of the holding, so far as it was proved, was the following:—By indenture dated the 8th November, 1792, John Congreve the elder, therein described as of Mount Congreve, and John Congreve the younger, therein described as of Landscape, granted to John Cook a rentcharge of £95 a-year out of the lands of Cappagh. John Congreve the younger made his will on the 10th March, 1801, and thereby gave his house and lands of Landscape to Ambrose Ussher Congreve his brother, for life, with remainder to his eldest son on attaining twenty-one. He was described in the will as of Landscape.

By an agreement, dated the 22nd November, 1801 (a memorial of which was produced), Christian Ewing agreed to take a lease of "the house and demesne of Landscape," including the lawn and woodlands of Cappagh, for thirty-one years at £150 a-year. Litigation having ensued between Ewing and the Congreves about this agreement, a deed of compromise was executed between

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the testamentary guardians of John Congreve a minor (the eldest son of Ambrose Ussher Congreve) and Ewing, whereby the latter agreed to give up the lands in consideration of an annuity charged upon, among other lands, "the house and demesne of Landscape." John Congreve, the minor, came of age, and by lease, dated the 4th September, 1822, in which he was described as of Mount Congreve, demised to John Quinlan the house, garden, and demesne of Landscape, for three lives or twenty-one years, at the rent of £132 16*s.* 2*d.*

John Congreve was married in 1827, and by a settlement dated the 9th October, 1827, executed prior to the marriage, in which he was described as of Mount Congreve, he settled Landscape along with other denominations of lands, which were all let to tenants. The deed did not apparently include Mount Congreve or the land round it.

The lease of 1822 expired in 1847, and after that the holding remained unlet for some years; the house was let by itself for one season, and then the whole of it, house and lands, were let to several successive yearly tenants until in 1857 it was let to Mansfield.

The Sub-Commission fixed a fair rent; the Land Commission, by order dated the 9th June, 1894, reversed this decision, and dismissed the originating notice. From that order the tenant appealed.

O'Connor, *Q.C.*, and *M. B. Cooper*, for the appellant.

Meredith, *Q.C.*, and *Feely*, for the respondent.

The judgment of the Court was delivered by:—

Fitz Gibbon, L. J.:—

July 24.

This is an appeal from an order of the Land Commission, dated June 9, 1894, discharging an order of a Sub-Commission which fixed a fair rent, and dismissing the tenant's originating notice on the ground that the holding is demesne land. Two questions have been argued:—First, that the holding was let wholly or mainly for the purpose of pasture, and, second, that it is "demesne land." The last written letting was by lease for

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Fitz Gibbon, L.J.

twenty-one years, dated April 24, 1857, from John Congreve, the father of the present landlord, to the present tenant, described as Edward Mansfield, of Monadiagh, in the county of Waterford, Esquire. The lease expired in 1878, and the tenant has since held upon the same terms. The lease contains no provisions indicating a letting for pasture, but the land has been and is chiefly in grass. Though there has always been some tillage, it has of late years been only two or three acres. Mr. Mansfield has been farming for forty years. At the date of the lease he had another farm of ninety acres within four miles; other farmers were looking for Landscape when he took it. There are a dairy and other offices; the land is equally suitable for tillage as for pasture; there was no evidence of any special purpose of pasture, and no exclusive fitness for pasture, from which such a purpose must be implied, as in *O'Brien* v. *White* (1). We are satisfied that the landlord's only purpose was to obtain the rent. The landlord offered a term of thirty-one years, which the tenant declined. The tenant took the place to farm it for profit; he was and is under no special obligation to use it for pasture, and we think that it is not to be excepted from the Land Acts merely because it has been used for pasture as being more profitable than tillage. The question of "demesne land" remains, and although each case of the kind must be considered and decided upon its own facts, this case raises some points of novelty and importance, and we must see that we do not act inconsistently with other decisions. The lease of 1857 describes the holding as "that part of the lands of Landscape as now in the possession of the said Edward Mansfield, containing forty acres or thereabouts, plantation measure, together with the dwelling-house and offices erected thereon," reserving mines, royalties, timber and trees. The rent is £110, being at the rate of £2 18*s.* per Irish acre. The dwelling-house is a good but old-fashioned house, suitable for a gentleman's residence, but at the date of the lease it was in bad repair. The tenant re-slated it, and expended some money in putting all the buildings into repair. He has lived there ever since, and the place is the home of a gentleman farmer. The total valuation of the holding is £84, including the valuation of the buildings, which is £15.

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(1) 16 L. R. Ir. 15.

It is impossible to say that the residence was the main subject of the letting, or that the holding, as a whole, is not agricultural or pastoral in its character, although there are ornamental trees to be found upon it, and it is beautifully situated upon the banks of the Suir, close to the woods and demesne of Gurteen. The holding is part of the Congreve estate, which is a large one, and the title begins with a deed of November 8, 1792, between John Congreve the elder, of Mount Congreve, and John Congreve the younger, of Landscape, his eldest son and heir-apparent, of the one part, and John Cooke of the other part, whereby a rentcharge of £95 was granted to John Cooke out of the lands of Cappagh, John Congreve the elder joining in consideration of natural love and affection for his son. This deed is important only as showing that at that time the head of the Congreve family lived, as now, at Mount Congreve, a large mansion and fine demesne, about ten miles lower down the Suir, while his eldest son and heir-apparent then lived at Landscape, and had some separate property, probably derived from his father, though this does not clearly appear. John Congreve the younger made his will on March 10, 1801. He is described as John Congreve of Landscape; and, subject to a life estate to William Congreve Alcock, he gives the lands of Glyn and Tourmare, "including my dwelling-houses and out-offices and lands of Landscape," to his brother Ambrose Ussher Congreve for life, with remainder to his eldest son on attaining twenty-one. We next have the memorial of an agreement by which Christian Ewing of Landscape agreed to take other lands, apparently derived under John Congreve's will, from Wm. Congreve Alcock, for £700 and £500 a-year rent, for thirty-one years, and also agreed to pay him £150 a-year for thirty-one years from September 29, 1801, "for the house and demesne of Landscape or Cappagh, including the lawn and woodlands of Cappagh." This is the first document in which the holding now in question appears as "demesne." On March 19, 1814, the testamentary guardians of John Congreve, a minor, the eldest son of Ambrose Ussher Congreve, who had died in 1809, were in litigation with Christian Ewing, who by a deed of compromise seems to have given up the lands held under the agreement of 1801, in consideration of an annuity of £550 chargeable, among other lands, on the house and demesne of Landscape or Cappagh, including the lawn and woodlands of Cappagh. John Congreve, the minor, came of age, and executed a lease of September 4, 1822, in which he is described as John Congreve of Mount Congreve, in the county of Waterford, whereby he let to John Quinlan of Mount Bruce, Esquire, the house, offices, garden, and demesne of Landscape, containing 38A. 3R. 27P., plantation measure, being apparently the holding now in dispute, for three lives, or twenty-one years, at a rent of £132 16*s.* 2*d.* There we have a letting by an owner in fee, describing the lands as demesne, at a time when there was no object in misdescribing them. The place fairly answered the description. It had been the residence, at least for a time, of the eldest son of the head of the family, and we are entirely satisfied that the place must be regarded as having been then "demesne land," the "demesne of the landlord."

We have not to consider here, as in *Magner* v. *Hawkes* (1) or *Spencer* v. *Tedcastle* (2), whether the tenant made it demesne or took or kept it as *his* demesne. It was "demesne land" of the Congreve family let as such, and if it has not been "undemesned" since, it is demesne land still. But at the same time we must remember that the landlord of 1822 had another demesne, with the family mansion-house upon it, where he then lived, at Mount Congreve, and he was therefore more likely to abandon the intention to use or retain Landscape as a demesne; in fact its previous use, as such, had been only temporary, and determined, when both places came to the same owner, as they seem to have done when John Congreve the minor, who was the eldest son of Ambrose Ussher Congreve and grandson of the original John Congreve the elder, came of age. Five years after he made the lease of 1822, he married, and executed a settlement on October 9, 1827, which we regard as of vital importance on the question of undemesning. This settlement, made upon his marriage with the Honorable Louisa Dillon, describes John Congreve as of Mount Congreve. It recites that he is seized in his demesne as of fee of various classes of property, that is to say, house-property in the city of Waterford, three townlands in the liberties of Waterford, the towns and lands of Bawn farm, Scart Ballythomas, Ballinamonitra, Landscape, Glyn, and Tour in the county of Waterford; the farm and lands of Drumbane in Tipperary, two townlands in Cork, and three townlands in Kilkenny. The settlement does not include Mount Congreve nor, so far as we can make out, any of the land adjoining it. Its purpose is recited to be that of preserving a competent part of the said estate, in the name, blood, and family of the said John Congreve, from which I infer that he retained other property, probably including Mount Congreve, in his own hands. All the property included in the deed is put into strict settlement, subject to £400 a-year pin-money and a jointure of £1000, and no distinction whatever is made between Landscape and the other land or the house-property. Remembering the omission of the family mansion-house and demesne, and the fact that Landscape was then let to a tenant, this deed affords powerful evidence that the settlor, who was owner in fee, settled all the property which he included in this indenture as *rent-producing* property. In other words, it affords evidence of "undemesning," and the circumstances made the intention to undemesne natural, if not probable. No doubt the tenant under the lease of 1822 might have been estopped from denying that he took Landscape as demesne land and was bound to give it up with the same character stamped upon it on the expiration of the lease; but on the other hand the landlord could undemesne it in 1827, if he liked, and if the settlement of 1827 afforded evidence that he no longer intended to retain it as demesne, those who took it afterwards under the settlement might take it up at the end of the lease as ordinary agricultural land. It therefore becomes doubly important to see how it was dealt with when the lease expired, which it did in or about 1847.

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(1) 32 L. R. Ir. 297.

(2) *Ibid.* 411.

We have examined the rentals from 1847 to 1857. The holding is always included under the name of "Landscape." It was for several years unlet. The house alone was let for one season. There are receipts for timber, either cut in the adjoining woods or possibly including some from the present holding, which remained on the landlord's hands unlet for five years. It was then let to several successive yearly tenants, and there is no

Appeal.
1894.

MANSFIELD, *Tenant;* CONGREVE, *Landlord.*

Fitz Gibbon, L.J.

evidence that there was anything special in the lettings, though the tenants were probably above the rank of ordinary farmers. In 1857 the lease to Mansfield was made, describing the premises in the terms I have already mentioned as "part of the lands of Landscape with the dwelling-house and offices thereon." I should mention that in 1854 the property was disentailed, and in 1866 it was resettled on the marriage of the present landlord Ambrose Congreve with the Honorable Alice Dillon; but Landscape is nowhere described as "demesne land" after the lease to Quinlan of 1822. Since 1827 there has been no evidence that the holding was considered or treated by the landlord as demesne land; and in that year, as I have mentioned, it was natural and possible that the intention to undemesne it existed. Having regard to the temporary character in which it had previously been demesne, and to all the other circumstances of the case, we hold that it has been undemesned. The *onus* of proving it to be now demesne land *prima facie* rests on the landlord; but even if that *onus* was discharged to 1827, or was shifted by the dealings up to and including the lease of 1822, we think there is preponderating evidence that from 1827 the character of demesne land has ceased; there is certainly no evidence that the land was taken up as demesne in 1847, or has ever been demesne since, and that is forty-seven years ago. The order of the Land Commission must be reversed, and the case must be remitted to proceed upon the originating notice as to justice may appertain, unless the parties agree to fix the rent and restore the order of the Sub-Commission.

Solicitors for Congreve: *Dobbyn, Tandy, & M'Coy.*
Solicitors for Mansfield: *Kenny & Stephenson.*

R. D. M.

M'CONAGHEY, Tenant; GLEDSTANES, Landlord (1).

Appeal.
1895.
Jan. 28,
Feb. 1.

Land Law (Ireland) Act, 1887—*Land Law (Ireland) Act,* 1881, *section* 58—*Corn-mill and flax-mill demised—Agricultural holding or mill holding.*

A holding may, as a whole, be agricultural in its character, though there be upon it a mill or some other subject which, if taken as separate entity, is not agricultural, unless the separate non-agricultural entity be a substantial rent-producing factor in the demise.

Boyle v. *Foster* (30 L. R. Ir. 623) distinguished.

Appeal by the tenant (pursuant to leave given by order of the Land Commission dated, June 4, 1894) against the order of the Land Commission dated, May 3, 1894, whereby the tenant's originating notice was dismissed and the order of the Sub-Commission fixing a fair rent was discharged.

The originating notice stated that the rent of the holding was £70, that the gross Poor Law Valuation was £65, and that the area in Statute measure was 70a. 1r. 19p. It also stated that the lands were held under a lease dated, March 8, 1856, made by Margaret Verschoyle, to David M'Conaghey for thirty one years from May 1, 1852, or for three lives, which ever should longest last.

This lease, made in consideration of the surrender of a former lease dated January 23, 1839, described the lessee as a "farmer" and demised to him "all that and those, that part of the lands of Tullydonnell, now in the possession of the said David M'Conaghey and his undertenants, containing in the whole fifty-four acres and a-half Cunningham measure, or thereabouts, be the same more or less, together with the corn and flax-mills, and the machinery thereof, and the corn kilns and appurtenances thereunto belonging, and all and singular the buildings, fixtures, and improvements thereon or thereto belonging with all waters and watercourses to said mills belonging or in anywise appertaining, which said lands and premises, are situate lying and being in the parish of Raphoe, etc.," to hold for the term aforesaid at the rent of £70. The lease contained the usual powers of distress and re-entry, the usual covenants by the lessee to pay the rent, to maintain and keep the demised premises and every part thereof, and all improvements made and to be made thereon, in repair; and at the determination of the demise so to yield up the same to the lessor; and not to assign without the lessor's consent in writing. The lease then provided that if the lessee did assign the premises without such consent, he should become liable to a penal rent of £50 and gave powers of distress and entry to the lessor to recover this penal rent. Next followed, quite distinct from the above-mentioned usual covenant to repair, a very express covenant to keep in repair the mills on the demised premises. "And the said David M'Conaghey doth for himself, his heirs, executors, administrators, and assigns, covenant promise and agree to and with the said Margaret Verschoyle, her heirs and assigns, that he, his heirs, executors, administrators, and assigns, shall and will keep the said corn-mill, consisting of double gearing, two pairs of stones, sifter, duster, and fans, and the machinery thereof, and the three metal kilns on said demised premises, and the said flax-mill and the several buildings on said demised premises, in the like perfect order, repair, and condition, they are now in, during the continuance of this demise, and will also at the end or sooner determination of this demise yield up, &c." The lease concluded with a covenant by the lessor for quiet enjoyment.

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(1) Before Walker, C., Porter, M.R., and Barry, L.J.

The earlier lease of January 23, 1839, was made in consideration of a fine of £650, and at a rent of £103 yearly; and in it the parcels were demised as "all that and those the farm and lands of Tullydonnell, originally in the possession of Galbraith Thompson, containing thirty-nine acres or thereabouts, Cunningham measure," and also, "All that and those the corn and flax-mills, and the machinery therein and the appurtenances thereto belonging, with the Mill lands of Tullydonnell, containing fifteen and a-half acres, Cunningham measure."

The lease of 1839 contained a covenant by the lessee to keep the mill in repair, identical in terms with that which was in the lease of 1856.

The report of the Sub-Commission showed that the holding was a very well managed tillage farm: it stated that the buildings belonged to the tenant "with the exception of the mill and two cottages which are kept in repair by the tenant, annual value £6," and it concluded with the observation "in this case £1 10*s.* has been added to the rent for water-power which is used for the threshing-mill."

The Sub-Commission fixed the fair rent of the holding at £58 10*s.* The landlord required the case to be reheard before the Land Commission. The Court Valuer reported that the fair rent would be £57 12*s.* His report stated that the valuation was £50 on the lands and £15 on the buildings: that the landlord claimed as his the "old corn-mill and flax-mill, now threshing-mill, and two cottages" and assessed the annual value of the threshing-mill as £4, of the two cottages as £4, and of the water-power as £5, but placed no value on the corn-mill. The Court Valuer's report concluded as follow:—"The water-power is useful for threshing corn, but does not appear to be abundant or continuous. The old flax-mill is being used as a threshing-mill. The two cottages are occupied just now by two workmen of the tenant's. The old corn-mill would now be quite useless, unless furnished with modern machinery, and even then I think, would not pay for working. The building might be turned to some use for the farm."

On the rehearing, evidence was given which showed that prior to the lease of 1839 the lands and the mills were two separate holdings: that the corn and flax-mills which had been first-class mills thirty or forty years ago had ceased to be used as such eighteen or twenty years before the rehearing: that the tenant had put a threshing-machine into the flax-mill, and that it was now used as a threshing-mill. Evidence was also given that the milling industry had completely died out in the district, and that flax was very little grown in the neighbourhood. The valuation of the tenant's valuer was £58 18*s.* 3*d.* gross: that of the landlord's valuer was £64 7*s.* 10*d.* gross.

The Land Commission holding that the case was ruled by *Boyle* v. *Foster* (1) and *Murdock* v. *Parks* (2), discharged the

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(1) 30 L. R. Ir. 623.

(2) Not reported. Court of Appeal, April 26, 1894. The facts of this case appear in the judgment of the

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order fixing a fair rent, and dismissed the tenant's originating notice.

From this order the present appeal was brought.

Ross, Q.C., and *Horner*, for the appellant:—

In *Boyle* v. *Foster* (1) and *Murdock* v. *Parks* (2) the mills formed substantial parts of the holdings: the mill in the former case was by the terms of the contract value for £80 *per annum*; and the mill in the latter case was insured by the tenant for £500. The proportions existing between the rents and the areas of the holdings in those two cases prove that the rent was not an agricultural rent: no such conclusion can be drawn here where the rent is only £1 a statute acre. The corn-mill was moribund when the lease of 1856 was made.

H. G. Richards, for the respondent:—

The special covenant to keep the mill in repair being introduced into the lease in addition to the ordinary covenant to keep in repair proves that the parties were making an agreement about a holding a substantial part of which was non-agricultural: *Boyle* v. *Foster* (1); *Wall* v. *Eyre* (3); *Murdock* v. *Parks* (2). The evidence shows that these were both first-class mills at the date of the lease.

Cur. adv. vult.

Feb. 1.

WALKER, C.:—

In this case the Land Commission dismissed the tenant's originating notice on the ground that the premises were let as a mill holding, and that therefore the case was governed by two cases decided in this Court: *Boyle* v. *Foster* (1), and *Murdock* v. *Parks* (2).

The premises with which we have to deal were formerly demised by a lease dated January 23, 1839, which grouped together two parcels of land in the following manner:—"All that and those the farm and lands of Tullydonnell, originally in

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Sub-Commission: 27 Ir. L. T. and S. J. 293.

(1) 30 L. R. Ir. 623.

(2) Not reported.

(3) 32 L. R. Ir. 475.

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the possession of Galbraith Thompson, containing 39 acres, or thereabouts, Cunningham measure," and "All that and those the corn and flax-mills, and the machinery therein and appurtenances thereto belonging, with the Mill lands of Tullydonnell, containing fifteen and a-half acres, Cunningham measure." That lease contained a covenant by the lessee that he would "keep the said corn-mill, consisting of double gearing, two pairs of stones, sifter, duster, and fans, and the machinery thereof, and the three metal kilns on said demised premises, and the said flax-mill, and the several buildings on the said demised premises in the like perfect order and condition" they then were in, and would also at the end or other sooner determination of the demise yield up the same and all improvements made on the premises to the lessor in like repair and condition. The lease was made in consideration of a fine of £650, and the annual rent reserved was at the rate of £103, bringing the true rent (if interest on the fine were calculated) up to a very large figure, at least £140.

On March 8, 1856, a new lease of the premises was made, which is the lease referred to in the originating notice. It purports to be made in consideration of the surrender of the former lease which had not then expired, and demises to the lessee—not two denominations, calling one "a farm and lands," and the other "mills" and "mill lands"—but "all that and those that part of the lands of Tullydonnell"; that is simply calling the demised subject "lands," "containing, in the whole, fifty-four acres and a-half, Cunningham measure," that is, the sum of the denominations demised by the former lease "together with the corn and flax-mills and the machinery thereof, and the corn kilns and appurtenances thereunto belonging, and all and singular the buildings and fixtures thereon, or thereto belonging, with all waters and watercourses to the said mills belonging, or in anywise appertaining, which said land and premises are situate, &c." The rent reserved by the new lease is a rent of £70 *per annum*, roughly speaking about half the former rent, and amounting, as the acreage is approximately 70 statute acres, to about £1 per acre. The entire valuation is £65, and is said to be arrived at by putting £50 on the land, and £15 on the buildings. It is plain that the rent reserved by the new lease was an agricultural rent, measured on the land only, and that the larger rent which was previously paid was measured on the land and the buildings. This appears not only from the figures, but also from the evidence given before the Land Commission by the landlord's valuer, who valued the land at the rent of £64 7*s.* 9*d.*; and the judicial rent was fixed at £58 10*s.* It is clear, therefore, that the rent reserved by the second lease was an agricultural rent only, and that no rent was fixed on the mills.

It would seem that for a time after the making of the second lease, the lessee David M'Conaghey worked, or tried to work, the mills, but how far the work was devoted to either mill separately does not appear. The evidence regarding the working of the mills is very meagre. It is proved, however, that the corn-mill was worked only fitfully for some years before 1874, and that since then it has been entirely unused.

On an agricultural holding a flax-mill would of course be more naturally found than a corn-mill.

Further, it appears from the Ordnance map that there was a dwelling-house on the larger denomination of 39 acres. There was also some kind of mill-house on the other denomination, which had been called the "mill lands." No doubt, the new lease contains exactly the same covenant in respect of maintaining in repair the corn mill as was contained in the lease of 1839, and whoever drew the new lease manifestly copied the covenant from the old one. The existence of this covenant does not, I think, outweigh the other matters which I have mentioned, and taking all the circumstances into account, I conclude as a fact that this corn-mill was not a substantial portion of the demise, nor a subject on which rent was measured in 1856.

I have no doubt that a holding may as a whole be agricultural in its character, though there is on it a mill, or open quarry, or some other subject, which if taken as a separate entity is not agricultural, unless the separate non-agricultural entity be a substantial rent-producing factor in the demise. Of course if the non-agricultural subject is expressly demised as a matter out of which rent is made to issue, being, for instance, something in the nature of an incorporeal hereditament, like the tolls in

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Wall v. *Eyre* (1), the non-agricultural character of the whole holding becomes more marked.

The Head Commission based their judgment on the two cases of *Boyle* v. *Foster* (2), and *Murdock* v. *Parks* (3). The facts of these two cases were clear and plain. In *Boyle* v. *Foster* (2), the lease contained a demise of 62 acres and 28 perches, Irish measure. The rent was £260 per annum, a very large rent. It was a demise of a mill holding. £80 was taken as the value of the rent attaching to the mill. The Sub-Commission fixed the fair rent at £156, measuring £116 on the land and £40 on the mill. There was a covenant that if the mill was burnt down the rent would be abated by £80 per annum, and the landlord insured the mill. As Lord Justice FitzGibbon points out in his judgment, if the mill were burnt the £80 was (pursuant to the covenant) to be struck off the fair rent, so the fair rent of the land would be interfered with. Thus, according to the valuation on which the fair rent of the holding was fixed, only £40 was put upon the mill. I should say that it would be impossible on the facts of that case to fix a fair rent at all. I think, too, that on the face of it, having regard to the value set upon the land and the value set upon the mill, the holding as a whole in *Boyle* v. *Foster* (2), must be treated as non-agricultural in its character. Lord Justice FitzGibbon, in his judgment in that case, takes care to point out that a holding may be agricultural in its character, though there be a mill upon it, and that that is pre-eminently the case where the mill is a flax-mill.

Murdock v. *Parks* (3) was a letting of 19 acres only, and the rent was £50. There was a covenant by the tenant to insure the mill for £500. Having regard to the largeness of the rent, and the size of the holding, and the whole frame of the lease, I do not think that anybody who heard the facts of that case could come to any other conclusion than that it was a mill letting.

I put to myself then the test which I have proposed, viz.:— Is the character of the holding taken as a whole agricultural? And assuming, as I do, that it may be so notwithstanding the

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(1) 32 L. R. Ir. 475. (2) 30 L. R. Ir. 623. (3) Not reported.

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existence of a mill upon it, I am of opinion that in this case the holding is, taken as a whole, agricultural in its character. Therefore I think that *Boyle* v. *Foster* (1) and *Murdock* v. *Parks* (2) do not rule this case, that the finding of the Sub-Commission was right, and that the decision of the Head Commission should be reversed, and the case remitted to them to proceed upon the originating notice.

PORTER, M. R.:—

I am of the same opinion. The case has been presented to us and to the Land Commission without any full or accurate information as to the mill or mills which give rise to the difficulty in the case, and we are, accordingly, left very much to speculate as to their description and value. One was a corn-mill, the other was a scutching-mill; the later fell into disuse, and has latterly been used for the purpose of threshing. It may therefore be left out of the case, for if it stood alone it could hardly be said that by reason of its being on the holding, a substantial portion of the holding would be shown to be non-agricultural. As to the corn-mill, I was, at first, in doubt whether it was used at all after the making of the lease of 1856. It does, however, appear to have been used after that date, but how or to what extent is left in obscurity. Having regard to the circumstances which the Lord Chancellor has pointed out—the acreage, the past history, and the present rent of the holding—were it not for one matter, viz. the covenant in the lease of 1856, to keep the corn-mill and machinery in repair, there would be very little difficulty in the way of the appellant.

The history of the holding appears to be this:—Prior to 1839 these lands formed two separate holdings—one containing 15 acres 2 roods, Cunningham measure, called the "Mill lands," and having on it these two mills: the other, a purely agricultural holding, much larger in size, containing 39 acres, Cunningham measure. In 1839 these two holdings were thrown into one, and a bulk rent of £103 fixed on the entire, subject to a fine of £650 which was paid. A new lease was taken in 1856; the rent was reduced to £70, the acreage being seventy statute acres; and there

(1) 30 L. R. Ir. 623.

(2) Not reported.

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is nothing in the description of the premises in this new lease to indicate that the mill formed a substantial portion of the letting. The lessee is described as a "farmer." There is, however, the covenant to keep the corn-mill in repair, and it must receive its legal construction, and must be understood as showing that the lessor wished to preserve his property, such as it was, from going to ruin. But, apparently, it was not much considered by the parties, and it was simply copied out of the lease of 1839. There is no covenant to insure.

When the case came before the Sub-Commission they viewed the property, and regarding it as an agricultural holding fixed the fair rent at £58 10*s*. The evidence before them was less conflicting in its character than is usual in cases like this. Some of the witnesses valued the holding at £64, and some at £58. Comparing the rent fixed by the Sub-Commission and the value placed upon the holding by the several witnesses examined before them with the reduced rent in the lease of 1856, it seems to me that the rent of £70 cannot possibly have been in excess of the agricultural rent of such a holding in 1856, and must be taken to have been merely an agricultural rent, and that no substantial part of it can be attributed to the mills.

Mr. Richards relied upon *Boyle* v. *Foster* (1). But in that case the rent was £260, or at the rate of £2 12*s*. an acre—a thing which in itself indicates that a considerable value (to say the least) must have been set upon the mill. But, further than that, £80 was assessed as the amount by which the rent was increased by the value of the mill. This appears from the special covenant, by which it was stipulated that if the mill was burnt, the rent of the holding was to be reduced by that amount. It was therefore plain, that in any meaning that can be put on the word "substantial," the mill was a substantial portion of the holding in *Boyle* v. *Foster* (1). For this reason I am of opinion, that that case does not at all govern the case before us, and I think that, notwithstanding the existence of the incorporated covenant in the lease of 1856 by which the lessee is bound to keep the corn-mill in repair, this holding was taken by agreement between the parties

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(1) 30 L. R. Ir. 623.

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as, and at a rent suitable to, an agricultural holding, and an agricultural holding only.

BARRY, L. J. :—

I have great difficulty in this case, but on the whole I concur in the result arrived at. On the facts there is a clear distinction between this case and *Boyle* v. *Foster* (1) and *Murdock* v. *Parks* (2). Having regard to the peculiar facts of this case, and basing my judgment entirely upon them, I concur in the judgment pronounced. I think we meet the merits of this case by holding that the corn-mill was practically an inappreciable part of the premises demised.

Solicitor for the tenant: *D. Wilson*
Solicitor for the landlord: *R. A. Wilson.*

G. Y. D.

Q. B. Div. 1895. April 20.

O'NEILL *v.* THE ST. BRIGID'S WELL CO. (3).

(1895. No. 2569.)

Practice—Service of writ of summons—Notice by advertisement—Company registered under the Companies Act, 1862 *—Unregistered Company— R. S. C., Ir.,* 1891, *Order IX., Rule* 11*—The Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *sect* 62*—C. L. P. (Ir.) Act,* 1853, *sect.* 33.

Service of a writ of summons upon a Company registered under the Companies Act, 1862, must, under R. S. C., Ir., 1891, Order IX., Rule 11, be effected, as provided by sect. 62 of that Act, by leaving the same or sending it through the post in a prepaid letter, addressed to the Company at their registered office; but this does not apply to the case of a Company not registered, and having no registered office.

MOTION to set aside the writ of summons in this action on the ground that the amount claimed in said writ for costs was excessive and that the service of said writ had not been effected in accordance

(1) 30 L. R. Ir. 163. (2) Not reported.

(3) Before JOHNSON, HOLMES, and GIBSON, JJ.

with the provisions of Order IX., Rule 11, and the Companies Act, 1862 (25 & 26 Vict. c. 89).

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WELL CO.

The writ was specially indorsed with a claim for £72 8*s*., goods sold and delivered, the particulars of debits and credits ranging between June, 1893, and January, 1894, and for £5 costs, and was directed to "The St. Brigid's Well Company, Limited, having their registered place of business at Dungarvan, in the county of Waterford."

The secretary of the defendant Company in an affidavit made to ground the motion stated that the writ was served on him at Dungarvan, and that the registered office of the Company was at 36, College-green, in the city of Dublin, and not at Dungarvan. The managing clerk of plaintiff's solicitor stated on affidavit that he had made careful and diligent search in the office for the registration of Joint Stock Companies in Ireland in order to ascertain the address of the defendant Company, but was unable to find that any such Company had been registered in said office; he further stated that he believed that the defendant Company carried on business at Dungarvan, where their secretary resided; and stated, as to the indorsement for costs, that same was not excessive, it having been necessary to insert notice of action (under R.S.C. Order IX., Rule 11), in the *Gazette* and a local newspaper. The Dublin agent of the defendant Company in an affidavit in reply stated that by a special resolution dated 16th October, 1894, a memorandum of which resolution was sent to the registrar of Joint Stock Companies, the present name of the Company was adopted (instead of that of "Haines & Company, Limited," the former name), in which name the Company was duly registered, and that the address of the Company was and is 36, College-green Dublin.

It would appear from statements made at the bar that the defendants had not yet completed the necessary steps with regard to registration under their new name, but had changed the name and address on their letter paper.

De Renzy, for the defendants:—

The indorsement for costs, £5, is excessive, and the writ should therefore be set aside with costs: *Harbison* v. *M'Larnon* (1); *Jacobs* v. *Monck* (2). The indorsement claims costs for publishing notice of action; such advertisements are no longer necessary under R. S. C., Ir. (1891), Order IX., R. 11. This rule is adopted (save as to advertisements in the case of corporations not governed by any statutory provision) from the English Order IX., Rule 8 (1883), and it has been held that the concluding clause of this rule has the effect of rendering applicable to writs of summons the mode of service prescribed by the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 62, 63, in regard to any summons, notice, order &c.: *White* v. *Land &c. Company* (3); *Wood* v. *Anderston Foundry Company* (4).

[Gibson, J.: There is a decision of this Court that, where a rule has been adopted from the English Orders, it is to be taken to have been adopted with the meaning affixed to it at the time of its adoption by judicial interpretation.]

[Counsel also referred to *Moore* v. *Belfast Railway Company* (5); *Towne* v. *Limerick S. S. Company* (6); *Watkins* v. *Scottish Imperial Insurance Company* (7); Wylie's Judicature Act, p. 219; Eiffe's Pr., p. 214; Annual Practice (1895), p. 262; Daniel's Ch. Pr. 368; Wilson's Judicature Act, p. 206; Buckley on Companies, pp. 158, 190.]

The plaintiff has been dealing with the defendants for years, both as Haines & Co., and as St. Brigid's Well Company. He knew that the change of name was being effected, and could not have been misled.

Stanley, Q.C., for the plaintiff:—

Prior to the rules of 1891, the established practice in this country, under the rules of 1877, and previously under the Common Law Procedure Act, was to issue advertisements. In England advertisements have never been necessary. It was not intended by the Irish rule, Order IX., Rule 11, to alter the existing practice, and I submit that the words of the rule apply only to statutory provisions operative in 1891, when the rule was made. The Common Law

(1) [1894] 2 Ir. R. 682.
(2) 12 L. R. Ir. 373.
(3) W. N. (1883), 174.
(4) 36 W. R. 918.
(5) 6 Ir. C. L. R. 441.
(6) 5 C. B. (N. S.), 730.
(7) 23 Q. B. Div. 285.

Procedure Act, 1853, was only repealed by the Statute Law Revision Act of 1892, and that repeal does not affect matters of procedure and practice. Therefore, at the date of the passing of the rules of 1891, there was a statutory provision in existence for service of writs of summons on companies, not the provisions of the Companies Act, 1862, but those of the Common Law Procedure Act, 1853, and therefore advertisements were, and are, necessary.

Section 62 of the Companies Act, 1862, was intended only to provide machinery for service of documents, "summons, notice, order, or other document," under the Companies Acts, and not to affect procedure in actions in the Superior Courts.

The last clause of Rule 11—"Where by any statute provision is made for service of any writ of summons, bill, petition, *summons*, or other process, &c."—deals with quite another subject matter, namely, procedure in actions in the High Court. "Summons" here must be taken as *ejusdem generis* with the other words in the context and as applying only to summonses issuing in proceedings in the High Court. "Summons" in the Act of 1862, section 62, can, on the other hand, it is submitted, only apply to summonses issued under the Companies code: *Towne* v. *Limerick S. S. Company* (1). In any event, however, "The St. Brigid's Well Company, Limited," are not a registered Company at all. They have dealt with the plaintiff, and thus have led him to sue them under this name. Not being registered, and having no registered address, the Companies Act, 1862, section 62, even if otherwise applicable, cannot affect their case. There is thus an absence of statutory provision, and the advertisements were necessary under the rule.

De Renzy, in reply.

JOHNSON, J. :—

The way the practice stands is this. Before the Common Law Procedure Act, 1853, a writ of summons was served on a joint stock Company under the Act of 1845 (8 Vict. c. 16, s. 135), which corresponded to section 62 of the Companies Act, 1862, except that the important words "any writ," which occur in sect. 135 of the Act of 1845 are omitted in sect. 62 of the Act of 1862. Then came the Common Law Procedure Act, 1853, sect. 33; and in *Moore* v. *Belfast, &c., Railway Co.* (1), it was decided that the Common Law Procedure Act, 1853, sect. 33, superseded and impliedly repealed sect. 135 of the Act of 1845, and dealt with service of proceedings against all persons and companies; and consequently that service of a writ of summons and plaint upon a Company ought then to be effected as provided by the Common Law Procedure Act, 1833, sect. 33. Then came the Companies Act, 1862, sect. 62, to which I have referred. In that state of things it was decided in England in the case of *Towne* v. *Limerick Steamship Co.* (2) that the Companies Act of 1862, sect. 62, did not supersede or impliedly repeal the provisions of the English Common Law Procedure Act, 1852, and that service of a writ of summons in the Superior Courts must, as the law then stood, have been effected under the Common Law Procedure Act, 1852, and not under the Companies Act of 1862; and attention was drawn to the omission, in the Act of 1862, sect. 62, of the words "any writ" which occurred in the Act of 1845, sect. 135. Thus the practice in England was analogous to that existing in Ireland, under the Common Law Procedure Acts in each country; and the practice in Ireland continued unchanged down to the Rules of 1877, under the Judicature Act, which by Order VIII., Rule 6 (differing from the English Rules), provided for service of a writ of summons on a Corporation as the Common Law Procedure Act, 1853, s. 33, had provided for like service of a writ of summons and plaint. Then came the English Orders, 1883, Order IX., Rule 8, which was interpreted by two decisions—*White* v. *Land, &c. Co.* (3), and *Wood* v. *Anderston Foundry Co.* (4)—under the concluding clause of that Rule (and I collect from the *Annual Practice* that the settled practice in England, according to those decisions, is that) service of a writ of summons, where a company has a registered office, must be effected as provided by the Companies Act, 1862, section 62, and that Rule 8 makes independent provision for the case in which (1) there is not, and (2) there is statutory provision for service of a writ on the Company. Then came the Irish Orders of 1891, of which Order IX., Rule 11 is copied from the English Orders of 1883, Order IX., Rule 8, and thus the practice, as settled in England under Order IX., Rule 8, becomes the practice in Ireland under Order IX., Rule 11. Therefore, if the defendant Company in the present case had a registered office, or fell within the concluding clause of Order IX., Rule 11, the motion would have been rightly instituted. But the case is met by Mr. Stanley upon this ground. The defendant Company was originally "Haines and Co., Limited," and for almost the entire of the present demand the dealings of the plaintiff were with Haines & Co., who had a registered office; but this Company resolved to change their name and transform themselves into "St. Brigid's Well Company, Limited," and took steps to carry this change of name into legal effect; but the transformation is yet incomplete; it still is in an inchoate condition, and "The St. Brigid's Well Company, Limited," has no registered address. It is stated that they have a place of business at 26, College-green; that they have note-paper stamped with that name and address, and hold themselves out by the name of "St. Brigid's Well Company, Limited": therefore it does not lie in their mouth to say to the plaintiff, you should have sued us as Haines & Co., and served the writ of summons as provided by the Companies Act, 1862, sect. 62. The short answer to the defendants' contention is that, although section 62 of the Companies Act, 1862, provides that a summons may be served by leaving it or sending it through the post, addressed to the Company at their registered office, "The St. Brigid's Well Company, Limited," has no registered office; therefore, the last clause of Order IX., Rule 11, does not apply, since there is no statutory provision for service in such a case. The plaintiff has properly served his writ of summons in compliance with the earlier provision of Rule 11, which applies to the present case, and the motion must, therefore, be refused with costs.

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(1) 5 C. B. (N. S.) 730.

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(1) 6 Ir. C. L. R. 441.

(2) 5 C. B. (N. S.) 730.

(3) W. N. (1883) 174.

(4) 36 W. R. 918.

Holmes, J.:—

I am of opinion that Order IX., Rule 11 (1891), altered the law as regards the mode of service upon Companies registered under the Act of 1862. Prior to the rules of 1891, it was necessary that there should be advertisements; since these rules came into operation advertisements are not required, and, therefore, costs of advertisements cannot be added. Under these circumstances, if the defendants had been registered under the Act of 1862, I should be of opinion that the motion was rightly instituted, and that it should be granted; but even then I do not consider that costs should have been given, inasmuch as it involves a change in the practice which has heretofore existed in this country.

There is, however, the practical difficulty that the defendants have not shown that they are registered under the Act of 1862. If they are not so registered, they cannot say that they should have been served in accordance with section 62 of that Act; and the only other way in which they could be served, assuming that they are a corporation at all—and as they have represented themselves to be so they must be so treated—is by service in the manner prescribed by Rule 11.

GIBSON, J.:—

I concur upon both points. I think that the final clause of Order IX., Rule 11, has changed the previously existing practice. As to the merits of the motion, the plaintiff was entitled to take the defendants at their word, and to assume that they were legally using the name they now go under. If the plaintiff had been aware of the truth, the action would have been brought against the defendants under their registered legal designation. If the defendants had registered their change of name, as they were bound to do, and as the plaintiff supposed they had done, the mode of service prescribed by the Companies Act, section 62, could not apply, as the Company, under their new name, had no registered office. The advertisements were therefore properly published under the rule, as against the St. Brigid's Well Co.

Solicitor for defendants: *D. J. Higgins.*
Solicitor for plaintiff: *J. Rose Byrne.*

A. E. R. J.

KINGSTON *v.* BARRY (1).

Q. B. Div.
1894.
Nov. 28.

Seed Potatoes Supply (Ireland) Act, 1890 (54 *Vict. c.* 1)—*Summary jurisdiction—Summons for seeds rate—Liability of succeeding occupier—Time within which summons may be brought.*

On complaint before Justices, payment of seeds-rate may be enforced against the successors in occupation of the purchaser, and such complaint may be made, as in the case of poor-rate, at any time after the date of the warrant authorizing collection of same.

CASE STATED by Justices pursuant to 20 & 21 Vict. c. 43.

At the Petty Sessions, holden at Clonakilty, on the 14th September, 1893, the complainant Kingston, a collector of poor rates, summoned the defendant upon a complaint that he had not paid the sum of £6 12*s*. 7*d*., for a poor rate made on the 23rd September, 1892, due notice having been given, &c. It appeared that, of the rate so struck, the sum of £1 10*s*. 4*d*. was due for poor rate and £5 2*s*. 3*d*. for seeds rate. The seeds rate was struck in respect of seeds procured by one John O'Connor, a tenant of lands within the Petty Sessions district, under the provisions of the Seed Potatoes Supply (Ireland) Act, 1890, for a number of cultivators. John O'Connor sold his interest in his holding to the defendant Barry, who entered into and was in occupation of same. Before the Justices, Barry disputed all liability for seed rate on the grounds that the complainant ought to show that the seed potatoes were given out in conformance with section 5, sub-sect. (*d*) of the Act, and that there should be some proof that the parties for whom the defendant's predecessor had contracted had sown potatoes, as in the absence of such evidence the proper mode of recovering the debt might be by process, as pointed out by section 9. It would seem from the Case Stated that the Justices took this view. Their difficulties were further increased by hearing it stated that, notwithstanding section 10 (4), of the Petty Sessions

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(1) Before JOHNSON and MADDEN, JJ.

Act, a County Court Judge had held that the complaint should have been made within six months after the signing of the rate and the collector's warrant—in this case the 23rd Sept., and 28th Oct., 1892. The Justices stated that another matter which operated on them was that a decree of the County Court Judge, obtained under somewhat different circumstances, had been appealed from; and as the Judge of Assize had reserved judgment and had offered to state a case, they thought it would not be right to give a decree owing to existing doubts, and dismissed the case accordingly. The Case Stated added that the attention of the Justices had been drawn to the decision of the Queen's Bench Division in *Guardians, Castlebar Union* v. *Ellicott* (1), and that all necessary proofs of sale, delivery, debt, and notice were duly made by the complainant.

P. D. Fleming, for the complainant:—

Seed rate is recoverable in the same manner and with the same remedies as poor rate (54 Vict. c. 1, section 6 (4)), and therefore recoverable from the purchasing tenant's successor in occupation—as was expressly decided in *Guardians, Castlebar Union* v. *Ellicott* (1) which, notwithstanding *Lamont* v. *Coy* (2), is a binding authority on this Court—and, like poor rate, subject to no restriction that the complaint must be made within a limited period (14 & 15 Vict. c. 93, sect. 10 (4)): *Guardians, Magherafelt Union* v. *Gribben* (3). Service of a copy of the case stated (which has been made in this case) is sufficient: *Massereene* v. *Bellew* (4).

There was no appearance for the respondent.

THE COURT held that the Justices were incorrect in point of law in refusing to convict the defendant, and remitted the case to them with their opinion to that effect.

Solicitor for plaintiff: *M. J. Bannin.*

A. E. R. J.

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(1) Noted—28 L. R. Ir. 243.
(2) 28 L. R. Ir. 242.
(3) 24 L. R. Ir. 520.
(4) *Ibid.* 420.

CLARKE *v.* CLARKE.

Gibson, J.
1895.
March 12.
April 18.

Trespass—Road contractor—Justification under invalid order of Justices—Order made ex parte*—Grand Jury Act,* 1836, *sect.* 162.

An order of a Justice, made *ex parte,* without notice or summons, authorizing a road contractor to enter upon lands, is void, and affords no answer to an action for trespass.

Civil Bill Appeal from a dismiss pronounced by His Honor the County Court Judge of Tyrone. The facts appear sufficiently from the judgment of Gibson, J., delivered in Dublin after consideration.

D. S. Henry, for the plaintiff.

J. W. Bird, for the defendant.

Gibson, J. :—

April 18.

The question in this action of trespass is whether an order under section 162 of the Grand Jury Act, authorising the defendant, a road contractor, to take materials on the plaintiff's land, is valid under the following circumstances. The defendant applied on summons to the Petty Sessions for an order and was refused. He afterwards renewed his application to one of the Justices who had sat at Petty Sessions, and, without any notice or summons to the plaintiff, and without any evidence on oath, obtained from the Justice an order, which, being drawn up by his solicitor, is right in form, and which is relied upon as justifying the alleged acts of trespass. The plaintiff's counsel contended that there was no jurisdiction to make such an order *ex parte,* and that it must be treated as void.

In my opinion an order under section 162 can only legally be made on summons or notice to the person whose property is sought to be affected (see *Cooper* v. *Wandsworth* (1), and *Tunbridge*

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(1) 14 C. B. (N. S.) 180.

Wells Local Board v. *Allroyd* (1)). The section must be read as implying the necessity of such summons or notice as a condition precedent to the exercise of jurisdiction. The order being good on its face, though it does not allege any summons, and not having been quashed, the question now raised is whether the plaintiff in a proceeding against the defendant is at liberty to invalidate it by relying on the admitted fact that it was made *ex parte*. I think that such an order is void, as the matter goes to the root of the magistrate's jurisdiction: *Bonaker* v. *Evans* (2); *Hammond* v. *Bendyshe* (3). How such an order came to be made passes my comprehension. The dismiss must be reversed.

Solicitor for plaintiff: *J. A. Hardy.*
Solicitor for defendant: *King Houston.*

A. E. R. J.

Gibson, J.
1895.
March 12.
April 18.

TRIMBLE *v.* BRECONRIDGE.

Landlord and tenant—Reservation of timber to lessor—Implied right to enter and remove—Compensation—Statutory tenancy—Land Law (Ireland) Acts, 1881 (*sect.* 5, *sub-sect.* 5), 1887.

The defendant was a statutory tenant of the plaintiff, subject to the conditions of a lease which excepted timber in the lessor's favour:—

Held, that the plaintiff had, by implication, a right to enter and remove the timber, and that, in the absence of stipulation, the defendant could not claim compensation for damage necessarily done in giving effect to the exception; and, following *Knox* v. *Baxter* (19 L. R. Ir. 460), that sect. 5, sub-s. 5, of the Land Law Act, 1881, did not alter the plaintiff's contract rights in this respect.

Civil Bill Appeal from the County Court Judge of Tyrone, heard before Gibson, J., at the Spring Assizes, 1895. The facts sufficiently appear from his Lordship's judgment, which was delivered in Dublin.

J. W. Bird, for the plaintiff.

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(1) 5 Ex. Div. 199.
(2) 16 Q. B. 162.
(3) 13 Q. B. 869.

Ross, Q.C., for the defendant.

Gibson, J.
1895.

TRIMBLE
v.
BRECONRIDGE.

April 18.

GIBSON, J. :—

In this case the plaintiff claimed damages for injury done in removing certain timber, cut and taken away by defendant as landlord under an exception in the lease. The lease expressly excepted timber in favour of the lessor, but contained no provisions as to cutting or removing same or compensating the lessee for any consequent damage.

In my opinion, there is an implied power of entry to cut and remove, and the lessee is not entitled, in the absence of an express clause to that effect, to compensation for damage necessarily done in giving effect to the exception; though he would be entitled to damages for injury of a superfluous character. The exception carries with it an implied easement or license, and for the enjoyment of such easement the lessor has not to pay.

The lessee, in pursuance of the Act of 1887, had obtained a fair rent order, and his counsel contended that under the Act of 1881, section 5, sub-sect. 5, the landlord was obliged to make amends for any damage occasioned to the tenant. According to *Knox* v. *Baxter* (1), however, if by the contract of tenancy the landlord was entitled to exercise the right of cutting timber without making any payment, the section referred to cannot be read as altering or reducing such contract right.

In my opinion the landlord did no more than was reasonably necessary for availing himself of his right to cut and remove timber, and the plaintiff has therefore no case, for trespass or otherwise. I affirm the dismiss.

Solicitor for plaintiff: *F. Mayne.*
Solicitor for defendant: *King Houston.*

A. E. R. J.

(1) 19 L. R. Ir. 460.

Q. B. Div.
1895.
April 22.

O'MEARA *v.* BARRY (1).

(1894. No. 9847.)

Practice—Costs, party and party—Costs of noting evidence of witness not examined at trial—Third counsel on trial of action—Costs of attendance of witnesses at the trial from the day fixed for trial until the actual hearing—Sunday intervening—Costs of consultation during progress of motion for new trial.

While the Taxing Master is not bound to take the direction of counsel in advising proofs as conclusively showing that a witness is material and necessary, the fact of a witness not being examined at the trial is not in itself a sufficient ground for disallowing the costs of taking a note of his evidence for trial.

In substantial actions the usual practice in Ireland is that the costs of three counsel at the trial should be allowed on taxation between party and party, and it rests on the objector to show why such costs should be disallowed.

In the absence of special reasons, a litigant's witnesses should be in attendance on the day fixed for trial, and from day to day while the case appears in the list for trial until the case is heard, and the costs of such attendance should be allowed.

Motion to review taxation.

The action was brought against the defendant for £100 damages for negligence as a solicitor, was tried on the 18th December, 1894, before Andrews, J., and a common jury, and resulted in a verdict for the defendant with costs. The alleged negligence had reference to the preparation, in 1893, of a bill of sale, which was made to include after-required property. It appeared that the grantor was at the time hopelessly insolvent, and the bill of sale was admittedly void against the assignees within the decision in *Thomas* v. *Kelly* (1888) (2). At the trial the learned Judge directed the jury to the effect that ignorance of this decision did not constitute actionable negligence, following *Mahony* v. *Davoren* (3).

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(1) Before Johnson, Holmes, and Gibson, JJ.

(2) 13 App. Cas. 506.

(3) 30 L. R. Ir. 664.

Q. B. Div.
1895.
O'Meara
v.
Barry.

On the taxation of the defendant's costs, Taxing Master Coffey made certain disallowances in reference to—I., taking notes of evidence for trial of a witness not examined at the trial; II., employment of second senior counsel at the trial; and, III., expenses of witnesses attending in Court from the day on which the case appeared in the list until the day on which it was actually heard.

Carton, Q.C., for the defendant:—

I. The first item is a disallowance of 6*s.* 8*d.*, "portion of a charge of £1 for attendance on three witnesses, and taking notes of their evidence for trial" (under Schedule of Fees, item 188). The Master's ruling was—"Two witnesses examined at 6*s.* 8*d.* each, allow; overrule (defendant's objection) as to the third."

The three witnesses were—1, the defendant; 2, his clerk (Neville), who had assisted in the preparation of the bill of sale; and, 3, the grantor of the bill. These were, the defendant submits, all material and necessary witnesses; their attendance had been directed by senior counsel in advising proofs, and a note of their evidence was therefore properly taken. They attended in Court, and it was only owing to the course of the trial that it became unnecessary to examine defendant's clerk. The defendant was able to prove all that under the circumstances was required.

I submit that it is not what occurs at the trial that should regulate the taxation, but the directions given by counsel when advising proofs, at least, his directions reasonably given: *Heffernan* v. *Vaughan* (1). It might have been necessary to show how far the grantor's circumstances were within the knowledge of defendant or his clerk, and to prove statements made by the grantor to the clerk. If counsel directs the attendance of witnesses, and their examination is rendered unnecessary owing to the course of the trial, the costs of taking a note of their evidence for the purposes of the trial should, nevertheless, be allowed.

[Holmes, J.: The circumstance that a particular fact can be proved by one witness is not a reason for a party not having a second witness to prove the fact. Juries are being told again and again—"there was another witness, but he is not produced." It is hard to lay down any rule; but, in an action of this kind—an action against a solicitor for negligence—I doubt whether any counsel at the bar would not have directed the attendance of both.]

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(1) 18 Ir. L. T. R. 38.

[JOHNSON, J.: I should be sorry to accept the proposition that, because counsel has directed a witness to be in attendance, the Master must take it that he was a material and necessary witness. Each case must depend on its own facts; but the ground put forward by the Master, namely, that two witnesses only were examined, cannot be sustained.]

The Master allowed the expenses of this witness in Dublin at the trial, and it was therefore inconsistent that he should refuse to allow the costs of taking down his evidence.

II. Four counsel actually appeared for the defendant at the trial, and the defendant claims to tax against the plaintiff for three. The Master's ruling was—"Four counsel charged. I allow two as quite sufficient, senior and junior; and having exercised my judgment and discretion, I disallow the two senior counsel."

The case was one of great importance to the defendant, whose professional reputation and prospects were involved. It is the established practice in this country to employ two seniors. In England the practice is different: *Glamorgan County Council* v. *Great Western Railway Co.* (1). There counsel practice more particularly in particular Courts, and the remuneration is higher. But here the practice has been to have two senior counsel in cases of any importance; the fees are smaller, and attendance throughout the case is not, as a rule, expected: cf. *M'Bride* v. *M'Bride* (2), also *Phelan* v. *Knaresboro'* (3), which was, however, a special jury case.

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(1) [1895] 1 Q. B. 21. (2) [1894] 2 Ir. R. 76.

(3) PHELAN *v.* KNARESBORO'. (1894. No. 2346.) Queen's Bench Division. 20th April, 1894. Before Johnson, Holmes, and Gibson, JJ.

O'Shaughnessy, Q.C. (with him *Jefferson*), moved to review the taxation by Master Coffey of plaintiff's costs—1, as to disallowance of third counsel at the trial, and, 2, as to disallowance of costs of a consultation held during the

[Gibson, J.: We did not decide that case merely on the ground that it had been tried by a special jury. The action was a substantial one, and the verdict was for over £200.]

[Holmes, J.: What I said was that in a certain class of cases, which there is no difficulty in recognising, the practice in this country for over forty years has been to allow three counsel; that this has become the settled practice, and that counsels' fees are moderate in consequence; and that therefore it rests upon the Taxing Master, where he disallows third counsel in such a case, to give some reason for so doing.]

[Johnson, J.: It is the exception in England to allow, and in Ireland to disallow, third counsel, assuming that we are dealing with cases which are not trivial.]

III. The Taxing Master disallowed £10 18*s*., and £1 9*s*. 9*d*. (portion of a charge of £18 18*s*. for defendant's attendance at the trial, at £3 3*s*. a-day for six days, and £1 9*s*. 9*d*. travelling expenses). The Master allowed £2 2*s*. a-day for three days, and £1 14*s*. travelling expenses. He also disallowed £1 10*s*., part of £3 for attendance of the defendant's clerk at the trial for six days, at 10*s*. The Taxing Master reported that he had allowed defendant and his clerk three days' expenses, as they resided at Birr, in King's County, and within reasonable distance of Dublin, and that he felt that the allowance was quite ample.

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progress of motion for a new trial. *Cherry* appeared for the defendant. The action was brought for £400 damages for breach of contract, was heard before Murphy, J., and a special jury, and resulted in verdict and judgment for £274 5*s*. 6*d*., with costs. Defendant moved for a new trial unsuccessfully. It was alleged for the plaintiff that the consultation was held during the progress of the new trial motion (which occupied two days) for the purpose of considering an offer of settlement made by the defendant at the suggestion of the Court. Counsel referred to *Kirkwood* v. *Webster* (9 Ch. D. 239), *Aaron's Reefs* v. *Twiss* ([1894] 2 Ir. R. 242), *M'Bride* v. *M'Bride* (*ibid.* 76), and *Hodson* v. *Armstrong* (26 Ir. L. T. R. 22).

The Court expressed the opinion that third counsel should have been allowed at the trial, and referred the matter back to the Master accordingly, but declined to interfere with the discretion exercised by the Master in reference to the costs of the consultation.

Solicitor for plaintiff: *W. B. Stuart*. Solicitor for defendant: *M. Buggy*.

Both the defendant and his clerk were (counsel urged) material and necessary witnesses. The defendant was Crown Solicitor for King's County, and in extensive practice; his attendance had been directed by counsel; he had to leave his business, and was entitled to charge according to the scale for professional witnesses. The action was set down for the 14th December, 1894. It appeared in the *Legal Diary* of the 13th December as to be heard the following day (Friday), and so appeared in the list each day until the 17th (Monday), when it appeared as to be heard on that day. The case was, however, reached only on the 18th, when it was heard and determined. Defendant and his witnesses had to come to Dublin on Thursday, and could not, with propriety or safety, have returned before the case was disposed of.

[HOLMES, J.: According to our present system, where notice of trial is served for a particular day, I think that, unless something occurs to show that attendance is not necessary, the parties should be in attendance, and the case ready to proceed.]

[GIBSON, J.: The amount is within the Master's discretion. The question whether the litigant is entitled to any costs of attendance as a witness (beyond expenses) is apparently not raised here. One of the six days appears to have been a Sunday. Is there any authority to show whether Sunday counts in respect of anything beyond maintenance?]

Some professional men, doctors for instance, practise on Sundays.

[HOLMES, J.: The fees which may be given to different classes of witnesses do not appear to be graduated so as to recompense them for their time, so much as to provide for their maintenance in accordance with their station in life.]

[GIBSON, J.: I do not quite agree in that.]

Law-Smith, for the plaintiffs:—

The allowance of third counsel should be confined to special jury cases. The present case was not, I submit, a difficult one, and, as a matter of law, a defendant is not entitled to costs occasioned by his employing additional counsel for the purpose of arguing special matters which might not, and in this case did not, in fact, arise. As to the six days' attendance, one of the days was a Sunday; and, as to the amount, that is a matter solely for the Taxing Master.

[Holmes, J.: I do not think that we should give any direction as to the amount; but the Master made a mistake as to the time. When a case is in the list, the litigant and his witnesses should be in attendance, unless and until it be adjourned, and the hearing fixed for a later date.]

Carton, *Q.C.*, in reply.

Johnson, J.:—

Upon the first point I do not agree with Mr. Carton that the mere fact that distinguished counsel advises the attendance of a witness, is sufficient to charge the unsuccessful party with the costs. It is for the Taxing Master to decide in each case. But we consider that the reason given by the Master is not a sufficient ground for disallowing the third witness, who might have been most properly in attendance.

We think that this is one of that class of cases in which second senior counsel should be allowed. In Ireland it has been usual, in such cases, to employ two senior counsel, and therefore some reason must be shown for not allowing second senior counsel.

The case was in the list from Friday, the 14th December, to Tuesday, the 18th, upon which day it was tried. It was the duty of the parties to be there in Court, ready to proceed with the case on any of the days for which it appeared in the list; and it would have been no excuse for them to say that they had been misled; that they had not expected the case to be reached.

The Master should have allowed from Thursday to Tuesday inclusive. The amount we leave to his determination.

Holmes and Gibson, JJ., concurred.

Their Lordships' order was as follows :—

> "On hearing, &c., It is ordered that the said items be, and the same are, hereby referred back to the Taxing Master to review his taxation thereof, the Court being of opinion that the fact that only two witnesses were examined is not a conclusive reason [as to I.]; and being of opinion that this case is of sufficient importance to justify the employment of three counsel [as to II.]; and being of opinion that the defendant and his clerk should be allowed witnesses' expenses from Thursday, 13th December, 1894, to Tuesday, 18th December, 1894 [as to III.]; and that the plaintiff do pay to the defendant the sum of £5 5*s.*, as and for the costs of this motion."

Solicitor for the defendant : *Albany Fetherstonhaugh.*
Solicitor for the plaintiff : *Wm. J. Menton.*

A. E. R. J.

Q. B. Div.
1895.
Jan. 15.
Feb. 27.

CLARKE *v.* M'GEEVER (1).

Grand Jury Law—Failure to appoint baronial cess-collector—Powers of collector subsequently appointed.

A Grand Jury which, during five successive years, had failed to appoint a collector of county cess over a certain barony, appointed the plaintiff at the Spring Assizes, 1894, and thereupon the warrants and applotment books, as well for the five preceding years, as for the Spring Assizes, 1894, were issued to the plaintiff. The plaintiff brought a civil bill against the defendant for county cess payable on foot of said several warrants :—

Held, on special case stated, that the plaintiff was only entitled to recover the amount applotted upon the defendant on foot of the presentment made at the Spring Assizes, 1894.

The duty of a collector of county cess is confined to levying the assessments presented at the Assizes at which he is appointed.

Special case stated, pursuant to 27 & 28 Vict. c. 98, s. 35, for the opinion of the Queen's Bench Division, by Johnson, J., on the trial of an appeal, at the Summer Assizes at Lifford, from a decision of the County Court Judge of Donegal, on a civil bill, dated the 7th June, 1894, between James Clarke, barony constable, plaintiff, and Charles M'Geever, defendant, "for £3 3*s.* 2*d.*, due for county cess, presented by the Grand Jury of the county Donegal on the defendant's holding, situate in the townland of Ballyboe, in said county, at the Spring and Summer Assizes, 1888, 1889, 1890, 1891, 1892, 1893, and Spring Assizes, 1894; also for money due by defendant to plaintiff by settled account between plaintiff and defendant."

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(1) Before Harrison, Holmes, and Madden, JJ.

The case stated was to the following effect:—

Previous to and at the Spring Assizes, 1888, for county Donegal, and thenceforth up to the Spring Assizes, 1894 (both inclusive), Charles M'Geever was tenant and occupier of a holding at Ballyboe, in the parish of Raymunterdoney in the county Donegal, and as tenant was liable to county cess.

At each successive half-yearly Assizes for said county, from Spring Assizes, 1888, to Spring Assizes, 1894 (both inclusive), the successive Grand Juries of the county made half-yearly presentments of county cess, to be levied off the said parish and holding, which were duly fiated and applotted, but were not levied, or collected, or paid to the county treasurer for the reasons given below. Abstracts from the applotment books were given; the applotments upon this holding amounting in all to £3 3*s.* 2*d.*

Although the several presentments were duly fiated, and the applotments on the said holding duly made out, no warrants for the collection of the said cess were signed or issued down to the Spring Assizes, 1894, inasmuch as no barony constable or collector of cess existed, or was appointed by the Grand Jury, or Quarter Sessions, or otherwise; and the Grand Jury were unable, and found it impossible, to obtain such barony constable or collector down to the Spring Assizes, 1894.

At the Spring Assizes, 1894, the plaintiff, James Clarke, was duly appointed; and thereupon all the warrants, with the applotment books annexed, for the county cess at each Assizes from the Spring Assizes, 1888, to the Spring Assizes, 1894, were signed and sealed by the secretary of the Grand Jury, and delivered to James Clarke, the plaintiff, for collection.

The several warrants and applotments were made out at each of the said Assizes, but a blank was left for the name of the collector, and they were not signed by the secretary until the said James Clarke was appointed.

It appeared that one Daniel Boyle had been the collector of the county cess for the barony prior to the Spring Assizes, 1888, and had absconded to America shortly before these Assizes. The Grand Jury at the said Assizes, and subsequently, had repeatedly endeavoured, both by advertising in the local papers, and otherwise, through individual members of their body and their secretary, to obtain a collector, but without success. The Grand Jury, through their secretary, had also ineffectually applied to the Executive to aid them, through the Constabulary, to collect the said cess. The learned Judge refused to allow the particulars of this correspondence to be gone into on public grounds. It appeared that during the period there had been some applicants for the post of collector, but only upon terms of receiving a higher poundage than the Grand Jury were authorised by law to allow.

The County Court Judge had given a decree for 3*s.* 9½*d.* only, being the amount assessed at the Spring Assizes of 1894, holding that the prior assessments could not be recovered.

From this decision an appeal was taken by the plaintiff to the Judge of Assize. For the plaintiff it was contended that all the above warrants were good, and legally enforceable in the plaintiff's hands, notwithstanding the lapse of time, and that the defendant was liable for the full amount, £3 3*s.* 2*d.* It was further contended that in any view the defendant was liable under the warrants issued for the Spring Assizes, 1892, to the Spring Assizes, 1894 (inclusive), and for the amounts presented at such Assizes. For the defendant it was contended that by virtue of the provisions of the 6 & 7 Wm. 4, and of 19 & 20 Vict. c. 63, all the said warrants except the last were void and out of date, and could not be recovered on. Johnson, J., stated that he was of opinion that the defendant's contention was right, and that he was prepared to affirm the decree for the sum of 3*s.* 9½*d.* only, but under the above circumstances directed a case to be stated; the question for the Court being:—"Is the plaintiff, under the above circumstances, entitled to recover from the defendant all or any part of the sum of £3 3*s*. 2*d*., other than the said sum of 3*s*. 9½*d*.

Cooke (*Ross*, *Q.C.*, with him), for the plaintiff :—

The plaintiff was appointed, under sect. 147 of 6 & 7 Wm. 4, c. 116, at the Spring Assizes, 1894, and is under that section entitled to sue for all arrears of county cess then outstanding. Sect. 148 gives him all power and authority of *any* high constable; he can sue for arrears which became due during the office of a preceding collector: *Hussey* v. *Holmes* (1); and the failure of the Grand Jury to appoint at previous Assizes cannot affect the right of a collector subsequently appointed to sue for arrears of cess. The section confers general powers; and it is, we submit, impossible to limit those powers in the way sought. If the collector could only recover cess presented at the Assizes at which he was appointed, it would have been necessary to give *special* powers to collectors appointed in case of death, or vacancy (sect. 147), or failure of the Grand Jury to appoint (11 & 12 Vict. cc. 26, 32). Further, the final clause of sect. 147, and the amending Acts, by making provision for temporary appointments at Sessions during the intervals between Assizes, imply that succeeding Grand Juries have power to appoint a collector over cess presented for at former Assizes at which there was a failure to appoint. Further, the provisions of the section are, we submit, directory merely, and the failure to appoint does not prevent the collection of former applotments by persons appointed at subsequent Assizes: see *Grove* v. *M'Elhinney* (2).

Wylie, *Q.C.*, and *Horner*, for the defendant :—

By sect. 147 the Grand Jury "*shall*, at *each* Assizes, appoint a proper person to collect all money which *shall* be presented." This provision is mandatory, and the authority conferred on the collector (who, technically, is newly appointed at each Assizes) is to collect the amount presented at those Assizes. It is a totally different question whether subsidiary matters may be directory merely, *e.g.* the giving of security under sect. 148: *Lawder* v.

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(1) 3 Cr. & D. 397.

(2) 30 L. R. Ir. 53.

Lawder (1); or the time within which warrants must be issued: *Grove* v. *M'Elhinney* (2). Sect. 145, and 19 & 20 Vict. c. 23, s. 6, empower the Grand Jury to re-present for outstanding arrears. This was the correct course to have taken during these years.

Ross, Q.C., in reply.

Cur. adv. vult.

Feb. 27.

HOLMES, J.:—

This case was argued before Mr. Justice Harrison, Mr. Justice Madden, and myself. Neither of my brethren can be in Court to-day. Mr. Justice Madden, however, has been made acquainted with the judgment which I am about to deliver, and concurs in it. I have not had a recent opportunity of consulting Mr. Justice Harrison, but I am aware that after the argument he was of the same opinion as that at which I had arrived. In any event this judgment is the judgment of two members of the Court out of three.

The question reserved for our consideration, although important, and, perhaps, difficult, is easily explained. The Grand Jury of county Donegal at several successive Assizes failed to appoint a high constable and cess collector for one of the baronies in the county, as provided by the 147th section of the Act 6 & 7 Wm. 4, c. 116. After each of these Assizes the assessments presented were duly applotted pursuant to the 3rd sect. of 19 & 20 Vict. c. 63; but, in the absence of a collector, the warrant mentioned in the 4th section could not be made out and delivered as therein prescribed. At length a high constable and collector was appointed for the barony in question at the Spring Assizes, 1894; and, thereupon, warrants having been perfected and annexed to the several applotments theretofore made, they were handed to the newly-appointed collector who took proceedings by civil-bill to recover some of the assessments presented and applotted at previous Assizes.

The present case was stated by the Judge of Assize on the hearing of an appeal in the case of one of these civil bills on which a decree for 3*s.* 9½*d.* only was made by the County Court Judge upon the ground that the collector was only authorized to receive the assessments presented at the Assizes at which he was appointed, and that the warrants attached to the earlier applotments were illegal or inoperative. This is the question reserved for our consideration, and its solution depends upon the legislation that deals with the appointment, authority, and duties of barony collectors. It has been said that the failure to appoint comes from the impossibility of finding a person who would accept the office for the remuneration authorized by the statutes. I am willing to accept this explanation, and I assume that the Grand Jury acted with all diligence. But there is nothing in the statutory provisions to show that the consequences of the omission to appoint are affected by the causes from which it arose; and the plaintiff is in no better position than if a collector had not been appointed through gross neglect, or a fixed determination to disobey the law.

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(1) Ir. R. 7 C. L. 57.

(2) 30 L. R. Ir. 53.

I have already referred to the 147th section of 6 & 7 Wm. 4, c. 116, which directs that a collector be appointed at each Assizes; and it seems to me impossible to read the provisions that precede and follow this section without coming to the conclusion that it was intended by the Legislature that his duty should be confined to collecting the assessments presented by the Grand Jury which appointed him.

Section 142 enacts that the Clerk of the Crown shall, within seven days after every Assizes, deliver to the treasurer of the county a copy of all presentments made and fiated at the preceding Assizes. Section 149 provides that the treasurer shall, within one month after he shall have received from the Clerk of the Crown copies of the presentments of the preceding Assizes, issue his warrants to the several persons who, under the provisions of this Act, are to be collectors. Section 151 directs the collector within ten days after he shall have received the treasurer's warrant to proceed to have the assessments applotted. Several steps, each within a precise limit of time, are prescribed for this purpose, and at length, when the applotment is complete, he is required to levy the money according thereto. The amount to be so levied is to be paid to the treasurer two days before the first day of the next Assizes (sect. 149), while the condition of the bond given by the collector and two sureties is to duly collect and pay to such treasurer on or before the first day of the next Assizes all such public money as he is or shall be required by him to collect (sect. 148). The 149th section no doubt enacts that the warrant shall remain in force for two years after its date, but it seems to me to be clear, having regard to the other matters to which I have referred, that the object of this provision is to enable the collector to protect himself against loss in cases where he has paid money to the treasurer pursuant to the condition of his bond before he has actually received it, and not to continue his relations with the Grand Jury beyond the Assizes next following the date of his appointment. This is shown more clearly by the power to re-present arrears conferred by the 145th section. This provision I think affords the strongest evidence that the collector's duty is strictly confined to the assessments presented by the Grand Jury by which he is appointed. The next Grand Jury closes accounts with him; and if arrears which he has left outstanding are to be made available for the county, they must be presented anew, and the assessment therefor included in the amount which the newly-appointed collector is required to levy.

The first Grand Jury Act did not contemplate a Grand Jury separating without appointing a collector. The 147th section provides for a temporary appointment by the Justices at Quarter Sessions in case of a vacancy occurring by death or otherwise, but it seems to have been assumed that an Assizes would not pass without an appointment having been made. It was afterwards discovered that this could not always be calculated on; and two Acts were passed in the year 1848, providing, in the event of a collector not having been appointed at the Assizes, that the appointment might be made any time before the next ensuing Assizes at general Quarter Sessions or at special sessions held for the purpose. Reliance has been placed by counsel for the plaintiff upon the fact that this power to appoint at sessions can only be exercised in the interval between the two Assizes; and the Court has been asked to infer therefrom that if no appointment were made during this period, it would be the duty of a collector appointed at the subsequent Assizes to levy the uncollected rates. I do not see the force of this argument. An enactment that an omission may be repaired in a particular way before a certain date does not imply that the Legislature contemplated that it might be repaired in another way at a later date.

An alteration in the mode of applotting Grand Jury Cess was made by the the third section of 19 & 20 Vict. c. 63. It is provided thereby that the applotment is to be made by the county treasurer before he issues his warrants to the collectors; and section 4 directs him, within two months after he shall have received from the Clerk of the Crown copies of the presentments of the preceding Assizes, to make out and deliver to each collector a fair copy of his portion of the applotment with his warrant annexed thereto. The same Act also contains a section relating to re-presentment in substitution for that contained in the original statute; but these amendments are based upon the principle which is to be found in the previous law, namely that the duty of the collector is confined to levying the assessments presented at the Assizes at which he is appointed.

The decision in *Grove* v. *M'Elhinney* (1) has no application to the case before us. It was held in it that the direction in the 4th section of the Act of 1856, that warrants were to be delivered to the collectors within two months after the county treasurer had received the copies of the presentments from the Clerk of the Crown, was not mandatory, and that a warrant delivered at a later date was operative. The Court is bound by this decision, which I may be permitted to say seems to me to be in strict accordance with legal principles. But how does it bear on the question now under consideration? The whole scope and purpose of the legislation dealing with the appointment of collectors are that the assessments presented at one Assizes should be levied before the next, so as to be then available for the public service. As ancillary to and for the purpose of carrying out this cardinal intention, certain things are to be done within specified periods. If it was held that a strict observance of these periods is necessary to give validity to the acts that are directed to be performed within them, it might under certain circumstances be impossible to effect the object for the furtherance of which these minute instructions are given. Therefore they are held to be directory as distinguished from mandatory. But if this principle were to be extended so as to legalize warrants given to collectors appointed at any subsequent Assizes, the result would be inconsistent with the whole subject-matter of the legislation.

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(1) 30 L. R. Ir. 53.

It is said that the assessments in question cannot be re-presented, and that, if the lately appointed collector cannot levy them, they will be lost to the county altogether. I offer no opinion upon the point of re-presentment; but even if the plaintiff is right in his contention, it ought not to affect our judgment. There is nothing *sacro-sanct* about Grand Jury Cess. The right to recover it, the obligation to pay it, are like other rights and obligations. They are protected and enforced so far as the law permits, but no further; and, in every case with which I am acquainted, a period may arise where right and obligation disappear altogether.

But if the *argumentum ab inconvenienti* is to be regarded at all, it tells altogether in favour of the defendant. Until a collector is appointed, it is not only impossible to recover county cess, but a ratepayer, anxious to pay it, would be unable to do so. No other officer would be justified in receiving it, or could give a legal discharge for it. I cannot conceive anything more unreasonable than that an assessment that is required for public purposes immediately, and that ought to fall upon the occupiers of rateable premises at the date of the presentment, should be held in suspense for years and then levied when the circumstances that called for it, and the persons affected by it, had entirely altered.

For these reasons, I am of opinion that the question reserved for the consideration of the Court should be answered in favour of the defendant.

Solicitor for the plaintiff: *W. Wilson.*
Solicitors for the defendant: *O'Doherty & Co.*

A. E. R. J.

CARROLL *v.* GREAT NORTHERN RAILWAY CO. (1).

(1895. No. 2257.)

Q. B. Div.
1895.
April 18.

Practice — Remitting to County Court —Action of contract —Unliquidated damages—Action for breach of contract, claiming a sum not exceeding £50 —*C. L. P.* (*Ireland*) *Act,* 1870, *ss.* 5, 6—*County Courts* (*Ireland*) *Act,* 1877, *s.* 51.

An action of contract, though claiming a sum not exceeding £50 as unliquidated damages for breach, cannot be remitted under section 5 of the Common Law Procedure (Ireland) Act, 1870.

Motion to remit, framed under 33 & 34 Vict. c. 109, s. 5.

The plaintiff's writ was indorsed as follows:—"The plaintiff's claim is for £33 13*s.* 10*d.* damages for loss sustained by the plaintiff by the negligence of the defendants as carriers of goods for the plaintiff for reward."

R. F. Harrison, for the defendants:—

The Court has jurisdiction to remit the action under section 5 of the Common Law Procedure Act, 1870. The action is one of contract, and the amount indorsed on the writ does not exceed £50. The sum claimed is "indorsed on" the writ: *Guy* v. *Hinde* (2). The plaintiff can so indorse a writ as to be estopped from saying that his action could only be remitted under the 6th section: *Byrne* v. *Melia* (3); *Archdale* v. *Morrison* (4).

If the plaintiff had indorsed his writ with a claim for damages generally, the defendants could only have moved under section 6. But here he has chosen to assess his claim at a specific sum less than £50, and consequently the defendants are entitled to move, either under the 5th section, or under the 6th section (as extended by section 51 of the County Courts Act, 1877).

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(1) Before Johnson, Holmes, and Gibson, JJ.

(2) Ir. R. 5 C. L. 247.

(3) 26 Ir. L. T. R. 119.

(4) 27 Ir. L. T. R. 135.

Cruise v. *Lenehan* (1) is distinguishable from *Guy* v. *Hinde* (2) as the claim was for over £40 and the comments of Fitz Gerald, J., upon the report of the earlier case, are his individual remarks made during the argument, and cannot be taken to be of equal authority with the formal decision and order of the full Court in that case.

The English cases are not binding authorities. Section 253 of the Common Law Procedure Act, 1853, and section 97 of the Amendment Act of 1856, both use the expression "action of contract." This expression is not in any English Act prior to the first English Remitting Act, which is *in pari materia* with the Common Law Procedure Acts; and, when the Irish Remitting Act passed, the term, "action of contract" had received a definite meaning from judicial decision, and included an action against a common carrier, such as this, and even against an attorney for negligence: *Kerr* v. *Midland Great Western Railway Company* (3), *O'Sullivan* v. *Dublin, Wicklow, & Wexford Railway Company* (4), *Quane* v. *Fraser* (5).

E. Cuming, for the plaintiff:—

Guy v. *Hinde* (2) was either wrongly reported or was wrongly decided. This is shown by the expressions of the same Judges in *Cruise* v. *Lenehan* (1) in the following year.

The "claim indorsed," of which the 5th section speaks, can mean nothing but a claim for a debt or liquidated money demand. This is an action for unliquidated damages, and the insertion of the amount which the plaintiff thinks he should recover can make no difference. The English cases are clear on the point: *Knight* v. *Abbot* (6), *Bassett* v. *Tong* (7).

The County Courts Act, 1877, by section 51, enables actions for breach of contract to be remitted under section 6. The Legislature must therefore have considered that such actions could not previously have been sent to the County Court.

It is not necessary to overrule *Guy* v. *Hinde* (2); this was done

(1) Ir. R. 6 C. L. 220.
(2) Ir. R. 5 C. L. 247.
(3) 10 Ir. C. L. R. App. 45.
(4) Ir. R. 2 C. L. 124.
(5) 16 Ir. C. L. R. App. 13.
(6) 10 Q. B. Div. 11.
(7) [1894] 2 Q. B. 332.

by the Judges who had given that decision; but, if it is necessary to disregard it, the Court is entitled to do so, as no appeal lay at that time from such an order.

JOHNSON, J.:—

We have heard this case at some length. The question is important, and rather barren of authority. Notwithstanding Mr. Cuming's observations, I must adhere to what has been already thrown out by the Court, namely, that this very point was decided by the Court of Queen's Bench in *Guy* v. *Hinde* (1871) (1). The case of *Cruise* v. *Lenehan* (1872) (2) was totally different. There the amount claimed for unliquidated damages was £100; and the decision was based upon this, that there was no jurisdiction under sect. 5 of the Common Law Procedure Act, 1870 (33 & 34 Vict. c. 109), to remit an action for unliquidated damages for breach of contract, when the amount claimed by the summons and plaint exceeded £40. In the course of the argument in that case, FitzGerald, J., is reported to have said to defendant's counsel, who was moving the motion—"Your difficulty is to show that the section applies to actions for unliquidated damages"; although that was exactly what the Court had decided in *Guy* v. *Hinde* (1), as I read the report and understand it. Besides this reflection on the authority of *Guy* v. *Hinde* (1), a further difficulty still remains, for, in that state of the law, the County Court Act of 1877 was passed, which, by sect. 51, enlarged the remitting jurisdiction. If at that time the law was that actions for breach of contract for unliquidated damages, not exceeding £40, could be remitted under sect. 5, and actions for more than that amount could not, it would only have been necessary for the Act of Parliament to have removed the limit and extended the jurisdiction, under sect. 5, to actions for unliquidated damages for breach of contract, without limit to the amount claimed; but what the Legislature did was to enact that the provisions of the 6th section of the Common Law Procedure Act should apply to actions of detinue, and that "the provisions of the same section may be applied to any action for breach of con-

(1) Ir. R. 5 C. L. 247. (2) Ir. R. 6 C. L. 220.

tract, or for any wrong or injury not disconnected with contract, if the plaintiff's claim in such action shall be for unliquidated damages." This appears to give considerable force to the argument of Mr. Cuming, and (as he contends) to recognise that, under the 5th section of the Common Law Procedure Act, 1870, no action for unliquidated damages for breach of contract could be remitted, and that therefore it was necessary to make provision for remitting that class of actions, and for that purpose to range them under the 6th section. This throws doubt upon the authority of *Guy* v. *Hinde* (1).

Therefore, having regard to the decision in *Guy* v. *Hinde* (1) in 1871, to the reflection upon that case in *Cruise* v. *Lenehan* (2) in 1872, and to the true construction of section 51 of the County Courts Act of 1877, I think that we have to decide the present motion before us upon first principles; and, that being so, I think that section 5 of the Common Law Procedure Act, 1870, does not apply to any action claiming unliquidated damages for breach of contract, and that such an action can only, by virtue of section 51 of the County Courts Act, 1877, be remitted under section 6 of the Common Law Procedure Act, 1870.

HOLMES, J.:—

I think it is of the greatest importance that the Court should follow its own decision, and, as a rule, I act upon that principle. In the present case, if *Guy* v. *Hinde* (1) stood alone, I should follow it, although I do not agree with it. However, this is not a case in which we have to deal with *Guy* v. *Hinde* (1) alone; for, in the following year, and before the same Judges, we have the case of *Cruise* v. *Lenehan* (2) in which a serious doubt was cast upon their former decision. That is not all; for in 1877 the Legislature, by sect. 51 of the County Courts Act, provided that the provisions of section 6 of the Common Law Procedure Act, 1870, "may be applied to any action for breach of contract or for any wrong or injury not disconnected with contract if the plaintiff's claim in such action shall be for unliquidated damages." I do not think that sect. 51 amounts to an express declaration that an action for unliquidated damages in contract could not have been remitted theretofore at all; but it certainly suggests that such was the view of the Legislature.

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(1) Ir. R. 5 C. L. 247.

(2) Ir. R. 6 C. L. 220.

It seems to me, therefore, that so much doubt has been cast on *Guy* v. *Hinde* (1) that I am now at liberty, if not bound, to reconsider the question. I do not think that *Guy* v. *Hinde* (1) is good law, and I could not give my grounds for this opinion better or more cogently than was done in the argument which Mr. Duffin is reported to have addressed to the Court in that case.

Gibson, J. :—

I add nothing as to *Guy* v. *Hinde* (1), by which we are not bound. I assume (without deciding) in defendants' favour that the case is for breach of contract and not tort, though the indorsement may not be necessarily for breach of contract. The moment Mr. Harrison admitted, as he was forced to admit, that he could not have moved if the amount of damages had not been specified by the plaintiff in his indorsement, it became apparent that his reasoning must be of a highly unsubstantial technical character, for in actions for unliquidated damages the plaintiff hardly ever states the amount of his claim ; and it would be strange that the plaintiff, by adopting a particular form of indorsement should be able to evade jurisdiction to remit. Taking the context of section 5, I cannot entertain a doubt that an action of contract, to be the subject of indorsement under this section, must be an action of contract for a liquidated demand which may be met by defences of payment or set-off, and not an action for unliquidated damages.

But the strongest argument is founded on the Act of 1877. Sect. 51 brings actions "for breach of contract, &c., if the plaintiff's claim be for unliquidated damages," within sect. 6 of the Common Law Procedure Act, 1870, under which the plaintiff can give security for costs.

There are two possible views of this section that may be presented for the defendants. The first is that this provision applies universally to all actions for unliquidated damages connected with contract—whether for £10 or £1000. This view seems inconsistent, for it is impossible that one and the same action, say for £40 unliquidated damages, should be the subject of application under sect. 5 or sect. 6, at the option of defendant. The second view is that the section only deals with cases which could not have been remitted under the Act of 1870; that actions for unliquidated damages under £50 could be remitted under sect. 5; but that actions for greater damages must be remitted under sect. 6 of the Act of 1870 as enlarged by the Act of 1877. But would it not be extraordinary legislation that, if a sham action was brought for unliquidated damages, it could, if for less than £50, be remitted under sect. 5, without the option of giving security, while, if it claimed more than £50, security for costs might be given and the action retained? The Act of 1877 was plainly intended to bring within sect. 6 of the Act of 1870 actions which had not previously been comprised in sects. 5 and 6. The English cases are distinctly in favour of the view now taken, and are the more authoritative, since, in the Consolidation Act, 1888, somewhat similar language was employed, which seems to imply that the Legislature was not quarrelling with the interpretation previously put upon the statutes by the English decisions.

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(1) Ir. R. 5 C. L. 247.

Solicitor for the plaintiff: *M. Moynagh.*

Solicitors for the defendants: *Crawford & Lockhart.*

A. E. R. J.

MAIRS, Grantee; LECKY, Grantor (1).

Appeal.
1895.
Feb. 19, 20, 27.

Redemption of Rent (Ireland) Act, 1891—Land Law (Ireland) Act, 1887, sect. 1—Land Law (Ireland) Act, 1881, sects. 8, 21—Land Act, 1870, sect. 4—Fee-farm grant—Fixing fair rent—Improvements—Permanent buildings—Reclamation of waste land—Drains and fences—Ulster custom.

In 1874 M. purchased from a tenant from year to year his interest in a holding subject to the Ulster custom. In 1875 M. obtained from L., the landlord, a fee-farm grant of the holding. After purchasing the holding M. executed improvements on the land, including the erection of permanent buildings, the reclamation of waste lands, and the making of drains and fences. In fixing a fair rent under the provisions of the Redemption of Rent (Ireland) Act, 1891, the Land Commission held that the grantee was not entitled to be exempted from rent in respect of these improvements, and that the Ulster custom was not enforceable under the Act of 1870 against a holding under a fee-farm grant:—

Held, reversing the decision of the Irish Land Commission, that M. was entitled to have his interest in the permanent buildings and the reclamation of waste lands, but not in the drains and fences, considered in fixing the fair rent, the Court of Appeal giving no decision on the question raised as to the Ulster custom.

Adams v. *Dunseath* (10 L. R. Ir. 109) discussed.

Mollan v. *Kieran* ([1894] 2 Ir. R. 27) overruled.

Appeal, by way of case stated by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

The case stated was in the following terms:—

"1. On November 2, 1891, the grantee in this case served an originating notice of an application in pursuance of the Redemption of Rent (Ireland) Act, 1891, to redeem his rent, and for an advance under the Land Purchase Acts, or, in case of the grantors not signifying their consent thereto in the prescribed time, to have a fair rent fixed. At the time of serving this originating notice the grantee, the Rev. J. S. Mairs, was in possession of the holding described in the said notice under a fee-farm grant, dated

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(1) Before Walker, C., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

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September 22, 1875, made by Matilda Lecky and Hugh Lecky to the said grantee. The particulars of the holding thereby granted are described in the said originating notice, and are as follows: area in statute measure, 18 acres; rent, £18; and gross poor law valuation, £12.

"2. The grantors did not signify their consent to the redemption of the said rent, and accordingly the originating notice duly came before a Sub-Commission as an application to fix a fair rent, and, by an order of the Sub-Commission, dated the 27th day of July, 1893, the fair rent of the holding was fixed at the annual sum of £10 10*s*.

"3. Notices of rehearing were served both by the grantors and the grantee, requiring the case to be reheard before three Land Commissioners sitting together. The case was reheard before three Land Commissioners sitting together at Belfast on February 19, 1894.

"4. From the facts proved before us it appeared that the farm is on an estate on which the Ulster custom of tenant-right is recognized, which custom authorizes the tenant of any holding subject to it on this estate to sell his interest in the holding, with the improvements on it, to any unobjectionable person, and that the holding in this case was, in the year 1874, purchased by the present grantee under that custom for the price of £100. At the time of the said purchase the holding was held under a tenancy from year to year at the yearly rent of £13, and Mr. Mairs, after his purchase, continued to hold under the said tenancy until he obtained the said fee-farm grant of September 22, 1875.

"5. After his purchase the grantee made considerable improvements on the lands, including the making of drains and fences, the partial reclamation of portion of the holding by removing of rocks and boulders, and the erection of permanent buildings. For the purposes of this case it is unnecessary to state the particulars or value of these improvements.

"6. On the part of the grantors it was contended that this case was ruled by the decision of *Mollan* v. *Kieran* (1), and that in fixing a fair rent the improvements claimed for were not exempted from rent. On the part of the grantee it was contended that said

(1) [1894] 2 Ir. R. 27.

decision was erroneous, and ought not to be followed, and that in any case it did not apply to this farm, because the estate on which it was situated was an estate on which the Ulster custom of tenant right existed, giving the tenant a right to sell his interest and improvements, as well as a right to compensation under the Act of 1870 entirely irrespective of section 4, and the limitations thereby enacted.

"7. No evidence was given that the Ulster tenant-right custom on this or any other estate extended to a holding held under a fee-farm grant, and we were of opinion that even if such evidence had been given the Ulster tenant-right custom was not enforceable under the Act of 1870 in respect of a holding held under a fee-farm grant. We were also of opinion that this case was ruled by our decision in *Mollan* v. *Kieran* (1), and that the tenant was not entitled to claim exemption from rent in respect of improvements made by him, whether buildings, fences, drains, or reclamation, and we were of opinion that the judicial rent should be fixed at £18; but on the application of counsel for the grantee, we agreed to state the present case for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

"The questions submitted for such consideration and decision are:—

"1. Whether, in fixing a fair rent a grantee holding under a fee-farm grant is entitled to be exempted from rent in respect of (*a*) buildings, (*b*) reclamation of waste lands, (*c*) drains, or (*d*) fences erected or made by him on his holding, or in respect of any and which of such classes of improvements.

"2. Whether the usages prevalent in the province of Ulster included under the denomination of the Ulster tenant-right custom in the Landlord and Tenant (Ireland) Act, 1870, are enforceable under that Act in respect of a holding under a fee-farm grant."

There is a report of the case before the Land Commission and also before the Sub-Commission in 28 I.L.T.R. 56.

Meredith, Q.C., and *Hume,* for the appellant.

Matheson, Q.C., and *Crookshank,* for the respondent.

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(1) [1894] 2 Ir. R. 27.

[The following authorities were cited: *Adams* v. *Dunseath* (1); *Mollan* v. *Kieran* (2); *Lanyon* v. *Clinton* (3); *Wigglesworth* v. *Dallison* (4); *Lyon* v. *Read* (5).]

Cur. adv. vult.

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THE COURT, having intimated that they were prepared to deliver judgment on the first question argued, but that if their decision on the second question were required the case must be re-argued; and the parties having consented to accept the decision on the first question:—

WALKER, C.:—

This case stated raises two extremely important questions.

The premises which contain 18 acres statute, and are situate in the county of Antrim, were originally held under a yearly tenancy at the rent of £13.

In the year 1874 Mr. Mairs the applicant bought the interest for a sum of £100, and on the 22nd September, 1875, he obtained a fee-farm grant at the rent of £18. The poor law valuation is £12. After his purchase he made improvements on the holding consisting of permanent buildings, reclamation of waste land, and drains and fences. I assume these were made after he obtained the fee-farm grant, and the argument proceeded on that assumption.

The Redemption of Rent Act became law on the 5th August, 1891, and on the 2nd November, 1891, he served an originating notice to redeem his rent and for an advance under the Land Purchase Acts, or, in case of the grantors not signifying their consent thereto in the prescribed time, to have a fair rent fixed.

The case proceeded under the latter alternative, and on the 27th July, 1893, the Sub-Commission made an order fixing the fair rent at £10 10*s.* on the basis that the grantee was entitled to be exempted from rent in respect of improvements.

There was an appeal, and the Head Commission fixed the rent at £18, on the basis that he was not entitled to exemption from rent in respect of any of his improvements; but they have stated a case for this Court, submitting two questions, the first of which is whether in fixing a fair rent the grantee holding under a fee-farm grant is entitled to be exempted from rent in respect of (*a*) buildings; (*b*) reclamation of waste land; (*c*) drains; or (*d*) fences erected or made by him on his holding; or in respect of any and which of such classes of improvements.

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(1) 10 L. R. Ir. 109.

(2) [1894] 2 Ir. R. 27.

(3) [1895] 2 Ir. R. 150.

(4) 1 Sm. L. C. 598.

(5) 13 M. & W. 285.

The *status* of the applicant to apply to fix a fair rent under the Act of 1891 is not disputed.

Inasmuch as the decision of the Head Commission was based on the assumption that it is a logical consequence of the decision in *Adams* v. *Dunseath* (1), that a grantee under a fee-farm grant who avails himself of the rent-fixing provisions of the Redemption of Rent Act cannot be exempted from rent in respect of any improvements made by him or his predecessors in title, it is necessary to see what was decided by the majority of the Court in that case, so far as material to the one before us.

The facts there were:—The lands had been held under a yearly tenancy by James M'Kee; and in 1842 the lands were valued and a rent fixed on them of £26 11*s.* 6*d.*

A verbal promise of a lease was made which was not granted till 2nd March, 1846. The term was thirty years. Before it was actually granted M'Kee built a dwelling-house.

On the 27th October, 1846, he sold to Adams who also made improvements in buildings, fences, and drains.

In 1869, Adams' son succeeded him as tenant, and he also made improvements in reclamation, fences, and drains.

On the 1st November, 1875, the lease expired, and the lands were re-valued, and a rent of £31 17*s.* 6*d.* assessed.

On the 17th October, 1881, the tenant served an originating notice to fix a fair rent under the Act of 1881. The fair rent had to be fixed under sect. 8, sub-sect. 1 of which provides that the Court shall fix it "after hearing the parties and having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district"; and it was also to be fixed under the absolute rule laid down by sect. 9, "No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title."

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It was contended for the landlord, notwithstanding these words, that "improvements" must be read as qualified and limited by all the restrictions contained in the provisions of the Act of 1870 as applicable to each state of facts there mentioned, and that this was made possible by the use of the words "otherwise compensated" in sub-section 9, and the words "interest of the landlord and tenant respectively" in the first sub-section.

For the purpose of arriving at a conclusion on the questions which the case presented, the learned Judges formulated five questions of law, the first and third of which only are material to the present: 1. What is the meaning of the word "improvements" in the 9th sub-sect. of sect. 8 of the Land Law Act, 1881?

2. Are the provisions of the final paragraph of the 4th sect. of the Land Act of 1870 (as to a tenant claiming compensation for improvements made before the passing of that Act), applicable to such improvements in determining what is a fair rent under the 8th sect. of the Act of 1881?

Lord Chancellor Law was the only one of the seven Judges who answered that question in the negative. He was of opinion the words of sub-sect. 9 were too clear to be controlled.

But all the Judges held, and necessarily held, that "improvements" must receive the definition given to it by the Act of 1870, but except the Lord Chancellor they held that the true basis of the enactment in the 9th sub-sect. was the right to receive compensation on quitting under the Act of 1870; and then there must be attached all the provisoes and qualifications annexed to each particular case by the 4th sect. of the Act of 1870. The point is put in a few sentences by the Lord Chief Baron at p. 154. After referring to the five provisoes engrafted by the 1st sub-sect. of the 4th sect. of the Act of 1870 on the general words "all improvements," and also to the 3rd sub-sect., he proceeds, "These provisoes show that works which add to the letting value of and are suitable to a holding (and therefore improvements, within the 70th sect.) are not, although made by the tenant or his predecessors in title, necessarily improvements in respect of which the tenant has a *right* to receive compensation. That he may have this *right* in respect of them the works must in addition be outside the 1st, 2nd, and 3rd provisoes, and the amount of compensation he had a *right* to receive in respect of such works is liable to reduction in respect of the matters mentioned in the final clause of the 4th section."

I accept, as is my duty, those conclusions. They are, while the law remains as it is expounded in *Adams* v. *Dunseath* (1), absolutely binding upon me; and though I may entertain an opinion of my own, I express none, and I shall now proceed to apply these conclusions to the case before the Court.

I shall first assume the tenant here to have made these improvements during the currency of a lease for thirty-five years, and that this lease had expired, and that he was applying under the provisions of sect. 21 of the Act of 1881 to fix a fair rent.

I apprehend that his position would be too clear for argument, and that as he held under a lease for a term certain of not less than thirty-one years, he would be entitled to have exempted from rent his improvements in permanent buildings and reclamation of waste land, but not drains and fences. The 3rd subsection of sect. 4 of the Act of 1870, is conclusive on this when once made applicable to "improvements" mentioned in sect. 8 of the Act of 1881. Let us now take a second case, viz.:—Suppose that the tenant held under a lease which would expire within ninety-nine years after the passing of the Act of 1881, and that he was applying under the Act of 1887, what would be his position? He makes his application at the prescribed time and in the prescribed manner, and the result is "such lessee shall, if *bona fide* in occupation of his holding, be deemed to be a tenant of a present tenancy in like manner and subject to like conditions, and subject to the same right of resumption as if his lease had expired, and his holding shall be subject to all the provisions of the said Act of 1881 with regard to present tenancies as if the tenancy therein were a tenancy from year to year."

Thus he becomes by virtue of the imputed expiration of such lease an imputed yearly tenant, subject to all the provisions of

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the Act of 1881 with regard to present tenancies, and one of these is that he may fix a fair rent, and do so as provided by sect. 8, and this at once puts him into the position of the first applicant I have mentioned; he is entitled to be exempted from rent in respect of permanent buildings and reclamation of waste lands, and I think it follows his lease cannot be treated as in any sense continuing for the purpose of depriving him of any right which the statute confers as incidental to fixing a fair rent.

But the legislation had not yet brought in a considerable class which had been left outside its scope, viz.:—(1) a lessee whose lease expired more than ninety-nine years after the passing of the Act of 1881; (2) a lessee of a renewable lease; (3) a lessee of a perpetual lease; and (4) a grantee under a fee-farm grant, including one who, as here, is a tenant by reason of its being made after the Act of 1860; and the Legislature considered it desirable to give to such the benefits which had been already given to a more limited class by the Act of 1887. Accordingly, by the Redemption of Rent (Ireland) Act, 1891, sect. 1, it is provided that " where a person in *bona fide* occupation of a holding to which Part I. of the Land Law (Ireland) Act, 1881, applies, is a lessee under a lease to which the provisions of section one or section three of the Land Law (Ir.) Act, 1887, do not apply by reason of the period of its expiration, or by reason of its being renewable or perpetual, or is a grantee under a fee-farm grant, and such person holds his land at a rent which the Land Commission considers, having regard to the renewal fines (if any) and all the circumstances of the case, holding, and district, to be a full agricultural rent, such occupier shall, subject as hereinafter mentioned, be entitled to apply in the prescribed manner to redeem his rent; whereupon, if the lessor or grantor, as the case may be, signifies his consent," the redemption shall be effected as thereby prescribed, and if the consent is not given, the lessee or grantee as the case may be "shall be deemed to have made the prescribed application under section one of the said Act of 1887, and *shall be held to be* a tenant of a present tenancy in manner and subject to the conditions and right of resumption mentioned in section twenty-one of the said Act of 1881, as modified by section one of the said Act of 1887, and his holding shall be subject to the provisions of the said Acts with regard to present tenancies." At once he steps into the benefits of the Act of 1887, and of sect. 21 of the Act of 1881, and through them into sect. 8 of the latter Act. His right to fix a fair rent is not disputed, but the terms are—Why should not sub-section 9 apply to him? Does the first sub-section apply? "The tenant of any present tenancy to which this Act applies . . . may from time to time during the continuance of such tenancy apply to the Court to fix the fair rent to be paid by such tenant to the landlord for the holding, and thereupon the Court, after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, may determine what is such fair rent." I could understand, though I could not follow the argument, that notwithstanding the Act of 1891 he is still not entitled to fix a fair rent because he is not a tenant. The argument is this, a person cannot claim exemption from rent unless he could claim compensation for improvements under the Act of 1870. A man cannot claim compensation for improvements unless he is a tenant, and a grantee under a fee-farm grant does not come within the definition of tenant in the Act of 1870, and never could get compensation under that Act. That is, that having imputed to him the *status* of present tenant, notwithstanding his position as grantee, you are, for the purpose of depriving him of rights incidental to the imputed *status*, to remit him to his original *status* as grantee, and deprive him of the imputed one, on which all his conferred rights rest. The logical result of that construction would be either that he should not be entitled to fix a fair rent at all, or that he should be exempted under sub-section 9 from rent in respect of improvements of all kinds. I do not think it would be possible to give the fee-farm grantee higher rights than a lessee, say for 999 years, while I do think it was intended to give him the same.

In this respect I differ from the decision of the Land Commission in *Kieran* v. *Mollan* (1), as well as from that in the case before us.

Therefore I think we should answer the first question by

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stating that a grantee under a fee-farm grant is entitled to be exempted from rent in respect of buildings and reclamation of waste lands, but not in respect of drains and fences.

PALLES, C.B.:—

The first question is whether in ascertaining the fair rent to be paid in respect of the holding of a grantee under a fee-farm grant who has applied under the "Redemption of Rent Act," rent is to be made payable in respect of improvements made by him and for which he has not been compensated by the grantor. The *ratio decidendi* of the judgment of Mr. Justice Bewley is based upon two matters:—1, the decision of this Court in *Adams* v. *Dunseath* (1); and, 2, the *status* of the fee-farm grantee.

The decision in *Adams* v. *Dunseath* (1) was that sub-section 9 of section 8 of the Act of 1881 is controlled by the words of the first sub-section of the same section "having regard to the interest of the landlord and tenant respectively," and that consequently "the improvements" which are to be excluded from consideration in fixing a fair rent consist of such interest under section 4 of the Act of 1870 in the works executed by the tenant or his predecessors in title as he would be entitled to receive compensation for if he were then quitting his holding.

As to the *status* of the fee-farm grantee, Bewley, J., truly says—"He is not within the definition of 'tenant' in section 7 of the Act of 1870, and is entirely *outside* the provisions of the Act giving a tenant right to claim compensation for improvements." Then he adds:—"It appears therefore to me to be the logical consequence of the decision in *Adams* v. *Dunseath* (1) that the grantee under a fee-farm grant who avails himself of the rent-fixing provisions of the Redemption of Rent Act, cannot be exempted from rent in respect of any improvements made by him or his predecessors in title." Thus the learned Judge assumes that the *only* effect of the Redemption of Rent Act is to attribute to the fee-farm grantee the *status* of tenant from the moment he is deemed to have applied to have a rent fixed, and that he is not entitled to be deemed to have had this *status* during his previous

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occupation under the grant. Such a construction of the Act is in my opinion too limited, and fails to give effect to the intention of the Legislature as indicated by the words used.

The words of section 1 are "shall be deemed to have made the prescribed application under section 1 of the Act of 1887, and shall be held to be a tenant of a present tenancy in manner and subject to the conditions mentioned in section 21 of the Land Act of 1881," "as modified by section 1 of the said Act of 1887," or (reading in this latter section) "as if his lease had expired." In other words the statute made determinable, and treated as actually determined, the perpetual estate conveyed by the grant, converted the grantee into a lessee (within the meaning of the Act of 1870) who *had* held under an expired lease, and thus attributed his occupation under the grant to an assumed lease which was to be deemed to have expired. Thus, in so far as necessary for the purpose of fixing the fair rent, he is to be deemed not only to be a tenant, but *to have been* such tenant from the execution of the fee-farm grant, and thus he is brought within section 4 of the Act of 1870, so far as the same is material to be considered in fixing a fair rent. He is therefore entitled to have his interest in permanent buildings and reclamation of waste lands, as improvements within the Act of 1870, considered in fixing a fair rent.

It is a more difficult question whether rent shall not be payable in respect of his other improvements, such as drains and fences. Section 4 sub-section 3 of the Act of 1870 provides that a tenant under a lease made either before or after the Act, for a term certain of not less than thirty-one years, or, in case of leases before the Act, for a term of a life or lives with or without a concurrent term of years, and which leases shall have existed for thirty-one years before the making of the claim, shall not be entitled to compensation except for permanent buildings, reclamation of waste lands, and certain tillages, as to which there is no question here. The appellant here did not hold for a term certain of not less than thirty-one years, but he did hold for ever. Is he within this sub-section? In my opinion he is. One of the facts which through this sub-section excludes the tenant from compensation for other improvements is that of the term of the lease being such that its duration, if it run its full course, must exceed thirty-one years.

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"Term certain" in this Act as passed meant "term *of years* certain," and is used strictly in contradistinction "to leases for a life or lives." But when this section is by subsequent legislation applied to leases for ever, whose duration beyond thirty-one years is, if they run their full course, as necessary as if they were leases for 999 years, I think "term" can well include perpetual duration, and that, taking the entire legislation together, a lease for ever (which this fee-farm grant is) is not less than a term certain of thirty-one years within the meaning of section 4, sub-section 3. I should have arrived at this conclusion entirely irrespective of any argument derived from section 21 of the Act of 1881, but that section strengthens the construction which I have adopted. It provides that at the expiration of existing leases, or of such of them as shall expire within sixty years after the passing of the Act, the lessees shall be deemed tenants of present ordinary tenancies from year to year. Any lease therefore executed in 1875, the term of which exceeded the maximum duration of a lease within section 21, would have excluded its owner from compensation for improvements other than those specially excepted in section 4 of the Act of 1870. But the Acts of 1887 and 1891 extended the operation of section 21 of the Act of 1881 by bringing within it leases and grants, the lengthened duration of which had previously excluded them from the benefit of that section. I think it follows that any lease or grant which was first brought within section 21 by these Acts of 1887 or 1891 must be taken to have been in the contemplation of the Legislature of duration more lengthened than that of any lease which but for those extensions would have been within that section, and *a fortiori* greater than thirty-one years certain.

I therefore hold that the only improvements which (if the Ulster custom be not applicable to the holding) ought to be excluded in the computation of the rent are permanent buildings and reclamation of waste lands.

FITZ GIBBON, L.J. :—

I entirely concur. The plan of these statutes is best described as "labyrinthine," and the judicial Ariadne has no chance of finding the way through them, unless by beginning at one end of the thread and following it to the other end. I prefer to begin at

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the Act of 1891, and to trace back the course by which a fee-farm grantee becomes entitled to the rights of a "present tenant." At the beginning of the Act of 1891, sect. 1, fee-farm grantees are classed with "lessees" under leases to which sects. 1 and 3 of the Act of 1887 do not apply "by reason of the period of their expiration, or by reason of their being renewable or *perpetual*." It appears to me to be perfectly plain that the framers of that section had no notion that grantees under fee-farm grants were to be in any respect in a different position from the lessees with whom they were classed, and who had been excluded from the previous Acts by the length of their leases alone. The subsequent provisions are equally applicable to both classes, and whether the tenure is for 99 years, 999 years, or for ever, the Act must have the same effect. The right first given is the right to apply to redeem the rent. In redeeming the rent, it is important to note that the sum which the landlord is to get for the redeemed rent is to be fixed, "regard being had to the adequacy of the security." Therefore, where the tenant has improved the holding, and thereby increased the landlord's security, this fact cannot be left out of account. Take the common case of a lease of building ground outside the Acts. At first the ground rent is secured only by the value of the site. But when a house is built by the lessee the market value of the ground rent rises, and may run up to 25 or even 30 years purchase. There the annual amount of the rent remains unchanged, though its capital value, and in cases within the Act its redemption price, is enhanced; but the landlord's "interest" is the same rent all the time. We have nothing to do with that now, because the landlord not having consented to redeem, the tenant has got certain other rights. He is (*a*) "deemed to have made the prescribed application under the Act of 1887, sect. 1"; and (*b*) he is "held to be a tenant of a present tenancy in manner and subject to the conditions and right of resumption mentioned in sect. 21 of the Act of 1881, as modified by sect. 1 of the Act of 1887." Thus we are led back to the Act of 1887, sect. 1, to which I pass, with the one remark, that the words "as modified" in the Act of 1891 cannot refer to either "manner" or "conditions," because the Act of 1887, sect. 1, made no change in these; and the only modification of the Act of 1881, sect. 21, is contained in

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the last paragraph as to the "right of resumption." For the effect of making "the prescribed application," we go to the Act of 1887, sect. 1. It enacts that the *lessee* is to "be deemed to be a tenant of a present tenancy in like manner and subject to like conditions as if his lease had expired"; and his holding becomes "subject to all the provisions of the Act of 1881 with regard to present tenancies as if the tenancy therein were a tenancy from year to year." The only difference between the position of a tenant under the Act of 1887 and under the Act of 1881 is that under the latter the lease must have actually expired, while the former allows the tenant to wipe out the remaining portion of his term, and to antedate its expiration. So we move back to the Act of 1881, sect. 21, and there we find that when the lease has expired the lessee is "deemed to be a tenant of a present ordinary tenancy from year to year, at the rent and subject to the conditions of his lease, so far as such conditions are applicable to a tenancy from year to year." Such a lessee would admittedly be entitled to a certain exemption from rent upon improvements. I therefore wholly fail to see how the grantee under a fee-farm grant can be in a worse position with regard to that exemption than if he had been what we are told to deem him to be, namely, a lessee who had been deemed to be a present ordinary tenant from year to year at the expiration of his lease. The legislation is involved, but you can trace it step by step. There is but one door through which any lessee or grantee can get into the benefits of the Land Acts, and that one door is the Act of 1881, sect. 21. Side entrances have been opened for more people to get in, but these only open into the outer thoroughfare that leads up to the one door of admission, and when the tenant gets there he gets the rights which are given by sect. 21.

As regards *Adams* v. *Dunseath* (1), I must say that, with the possible exception of the Lord Chancellor, every Judge was careful to point out that the Ulster custom was assumed not to apply at all. You will find passages to that effect notably in the judgments of Sir Edward Sullivan, the Lord Chief Baron, and myself, because we foresaw difficult questions that might arise if our decision was applied to an Ulster custom case.

(1) 10 L. R. Ir. 109.

If those questions are to be raised now, they must be further argued, and I say no more about them than that I shall require to be shown how the fair rent of a fee-farm grantee in Munster can be more than the fair rent of an identical holding in Ulster, where the landlord has granted away both holdings at the same rent and on the same terms for ever, and both rents are equally well secured.

In cases unaffected by the Ulster custom, the decision appears to me to be, that in exercising the duty which the Act, sect. 8, sub-sect. 1, imposes, of "having regard to the interest of the landlord and tenant respectively," the Court is to consider the interests of both the one and the other as "checked," "modified," or "measured," by the rights conferred upon the tenant by the Act of 1870. That is in fact the only method of reading this code consistently with the express and repeated enactments that the Acts are all to "be construed together as one Act," except so far as they are inconsistent, and that their "words and expressions" are to have the same meaning throughout.

I should like to put a case to show the effect of Mr. Justice Bewley's interpretation. But I must entirely disclaim any intention to deal with amount or value. I use figures for illustration only. A landlord, before 1870, grants for ever to a tenant a farm of 50 acres of agricultural land at £1 per acre, being the full agricultural rent at the time. There are no buildings on the farm, no homestead and no residence, and the grant imposes no condition or obligation upon the tenant to build. The grantee, at his own expense, erects a house for himself, and a steading suitable for working the farm. These increase the letting value by say £12 10*s.* per annum. There is a fall in the value of agricultural land of twenty-five per cent. for which neither party is responsible; that is to say, the agricultural rent of the land falls by £12 10*s.* and comes down from £50 to £37 10*s.* But the buildings which the tenant has put upon the place have increased its value by the same amount. The decision of the learned Judge amounts to this, that the grantee cannot get his rent reduced at all, although there has been a fall of 25 per cent. in the value of the thing originally demised, and the landlord has added nothing to it. The "fair rent" remains the same, because the tenant has added 25 per cent. to the "holding," at his own expense, and under no obligation or contract so to do. This is a decision that the tenant's own expenditure, incorporated with the holding, has become not partly but altogether a portion of the interest of the landlord, and that £12 10*s*. of rent is thenceforth to be payable upon it. Such a result, I say, is contrary to the express words of the Act of Parliament, and outside the Act there can be no reason for it, because the landlord never could get any of the value or enjoyment of the tenant's buildings so long as the grant endured. They increase the security for his rent. They do not increase its amount.

But how does *Adams* v. *Dunseath* (1) come in? It shows that even in the case I put it would not *necessarily* follow that *the whole* of the additional 25 per cent. was to be excluded from consideration in fixing the fair rent. The case of building is, perhaps, the most favourable to the tenant, but it does not necessarily follow, even in that case, that the whole increase of the letting value consequent on their erection belongs to the tenant. Why? Because the facilities for working the farm, its natural advantages, its "profitableness" so to speak, which were not created by the tenant, but in which the landlord as well had an interest, may have been developed by the tenant putting buildings on the place, which made it, as a whole, more valuable than before, and did so to a degree beyond the mere expenditure upon them. So far as the increased value is attributable to the inherent capabilities of what the landlord originally let, it would be manifestly unjust to ignore the landlord's interest, and to give him no rent. If you take the case of reclamation, this will appear more clearly. One landlord lets a piece of land which cannot be reclaimed except at great expense, and when it is reclaimed, it is to a very small extent increased in letting value. Another lets land which, after reclamation, is at small cost made much more valuable. Surely it is according to common justice that the landlord should get more rent in the latter than in the former case? Because, until the letting, the thing that has increased in value was altogether his, and after the letting the thing, in which each of the parties had an interest, was naturally such as to give a larger return for expenditure upon it. Upon that point the Court was unanimous in *Adams* v. *Dunseath* (1), and the majority held also that the tenant's rights were to be measured and controlled by what he would get if he quitted his holding.

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(1) 10 L. R. Ir. 109.

Tracing the thing step by step, as I have done, we cannot put the grantee in fee-farm in any different position from that of the lessee whose lease has expired, and as such a lessee would be entitled to compensation for permanent buildings and reclamation of waste lands, regard must be had to these in considering the interest of the tenant when fixing the fair rent. With all respect, the decision appealed from would lead us into a plain disobedience of the statute, and there is nothing in *Adams* v. *Dunseath* (1) to justify such a conclusion. Our decision will enable every tenant to be fairly exempted from rent for what he has done himself, so far as his own expenditure is concerned. It will, at the same time, re-affirm the distinction between the actual expenditure of the tenant, and the increased "profitableness" of the holding, that is derived partly from that expenditure, and partly from the capacities of the landlord's property.

One word as to how it is that the grantee cannot get full credit for all his improvements. It is because we cannot make him better than the man whom he is deemed to be, and the lessee whom he is deemed to be is one to whom the Acts have given a choice either to hold on to his bargain (which in the case of the grantee would last *in secula seculorum*), or to have his tenure changed and his rent assessed in a particular way, namely, subject to the conditions of his lease, so far as applicable to a tenancy from year to year, and upon the assumption that his lease has run its full course, and has expired. We have here no special conditions to deal with. If this grant had been a lease, and had expired, the tenant would have been entitled to compensation for permanent buildings and for reclamation only, and the grantee accordingly has the option to take the bargain that parliament has offered him, in exchange for the bargain that he has actually made. As the law stands, he is entitled to no more.

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(1) 10 L. R. Ir. 109.

Appeal.
1895.

Mairs,
Grantee;
Lecky,
Grantor.

Barry, L. J.:—

I was not a member of this Court when *Adams* v. *Dunseath* (1) was decided, and this is the first occasion on which the decision in that case has been submitted to my judicial consideration. It certainly is not easy to read that case without having suggested to one's mind the inquiry—Why, if the general words of subsection 9 of section 8 of the Act of 1881 were not intended to receive their ordinary grammatical meaning, but were to be read as controlled by the words "having regard to the interest of the landlord and tenant respectively," that intention was not expressed in plain language? On the other hand, if it was intended that the words "having regard to the interest of the landlord and tenant respectively" were not to control the 9th sub-section it is hard to see why the draftsman put them into the 1st sub-section, the meaning of which, if they were omitted, would be unchanged—as a "fair rent" must *ex vi termini* "have regard to the interest of the landlord and tenant respectively"—and in which, if they are to be limited to it, they are a mere pleonastic expression.

However, with that we have now nothing to do. We have only to construe the Redemption of Rent (Ireland) Act, 1891, in the light of *Adams* v. *Dunseath* (1), and in doing that it is not necessary for me to say anything beyond that I entirely agree with the judgment of the Lord Chancellor, the Lord Chief Baron, and my brother FitzGibbon, viz. that we must answer the first question put to us by the Land Commission in the affirmative, so far as relates to permanent buildings and reclamation of waste lands.

Solicitor for the appellant: *Martin.*

Solicitors for the respondent: *Crookshank, Leech, & Davies.*

G. Y. D.

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(1) 10 L. R. Ir. 109.

In re DOHERTY'S PRESENTMENT (1).

Appeal.
1895.
Feb. 18, 19, 27.

(County Londonderry Presentments, 1894.)

Grand Jury—Road contract—Application for payment—Certificate of county surveyor—Power to certify and to present for payment half-yearly for period still incomplete—Power to certify and to present for portion of sum applied for by contractor—Power to re-present for residue—6 & 7 *Wm.* 4, *c.* 116, *s.* 130.

D.'s tender for keeping in repair 1620 perches of road at 11*d.* per perch per annum for five years, from the Summer Assizes, 1893, was accepted and fiated at the said Assizes. In October, 1893, D. applied for payment, as for one half-year, of £37 2*s.* 6*d.* Upon this application the county surveyor indorsed his certificate that the work had been "duly executed according to contract to the amount of £35 6*s.* 6*d.*," leaving a balance of £1 16*s.* to be re-presented. At the road sessions in November, 1893, this application so indorsed, was allowed, and at the Spring Assizes following the Grand Jury presented the sum of £35 6*s.* 6*d.*, to be paid to the contractor, and re-presented the balance £1 16*s.* A cesspayer obtained a conditional order for a writ of *certiorari* to quash the said presentment and re-presentment on the ground of illegality, it being contended that the county surveyor could only certify for the full amount payable, or not at all:—

Held (affirming the decision of the Queen's Bench Division, *ante*, p. 158), that the order for the writ of *certiorari* must be made absolute, the certificate having been given, and the presentment having been made, in respect of a sum claimed as payable for keeping the road in repair for a period then not yet ended, and therefore being premature.

Held, also, that, assuming that the time for payment had arrived, it was legal for the county surveyor to certify for a portion of the amount claimed, and for the Grand Jury to present such portion and to re-present the residue.

Appeal from the decision of the Queen's Bench Division, reported *ante*, p. 158.

Houston, Q.C., and *A. Todd*, for the appellant.

D. Henry, for the Grand Jury.

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(1) Before Walker, C., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

Appeal.
1895.

In re Doherty's Presentment.

Feb. 27.

The arguments were substantially the same as those already reported in the Court below.

Cur. adv. vult.

Walker, C.:—

William Doherty made a tender, dated the 26th June, 1893, in the following form for the execution of the work therein mentioned:—" 'To keep in repair for five years from the Summer Assizes, 1893, 1620 perches of road . . . . not to exceed 11*d.* per perch per annum,' at the rate of 11*d.* per perch per annum, the work to be executed and the contract carried out in every respect in accordance with the general specification of the county surveyor last issued, and the terms of the advertisement for tenders." The tender was accepted and a presentment made at the Summer Assizes, 1893, which appeared in the Grand Warrant of said Assizes as—"No. 696. To William Doherty, of Lisglass, to keep in repair for five years, from Summer Assizes, 1893, 1620 perches of the road from Londonderry to Dunnamanagh, between, &c., according to the general specification for keeping roads in repair, 180 cubic yards of warblishing quarry stone, 3rd class, No. 61, at 11*d.* per perch per annum. First half-year, £37 2*s.* 6*d.*"

Doherty entered on the work, and on the 19th October, 1893, previous to the Presentment Sessions, put in an application for payment of £37 2*s.* 6*d.* This application follows the usual form. It recites that at the Summer Assizes, 1893, the said 1620 perches were presented to be kept in repair for five years, by contract, at the yearly sum of £74 5*s.*, that Doherty had contracted for the same, and concludes as follows:—" Now this is to certify that the said perches and every part thereof, have been kept in good and sufficient repair and condition since the commencement of my contract in conformity with the presentment and the specification of the county surveyor, and that the said perches and every part thereof are now in good and complete repair and condition, and that the said perches are free from nuisances, and I hereby apply for payment of the sum of £37 2*s.* 6*d.* for keeping the same 1620 perches in repair for one half-year. (Signed), William Doherty, Contractor." The county surveyor certified that the work was "duly executed according to the contract to the amount of £35 6*s*. 6*d*." The application and this certificate were laid before the Presentment Sessions, and the amount so certified was there allowed. Then at the Spring Assizes, 1894, the presentment was made by the Grand Jury, founded on the proceedings at the Presentment Sessions, for the reduced sum, £35 6*s*. 6*d*., and the balance, £1 16*s*. was re-presented.

It is this presentment for payment that is impeached in these proceedings, and that has been quashed by the Queen's Bench Division. One of the objections taken to it raises a very important question on the construction of the Grand Jury Acts, viz. whether the county surveyor could certify that part of the work had been performed, and then the sessions sanction, and the Grand Jury present for, payment of such part of the work as appeared to have been performed in pursuance of the contract. The Queen's Bench Division did not express any opinion on this question, but having regard to the importance of the matter involved by it, I think we ought to state our views respecting it. In my opinion the county surveyor has the power to certify in the form adopted in this case, and the sessions has the power to sanction, and the Grand Jury to present, the amount so certified. I think this appears upon the construction of the different sections to which we have been referred during the arguments. Section 17, dealing with applications in respect of works, says—"the said Justices and cess-payers shall after such examination decide by majority of voices upon every application, and whether the same ought to be adopted or rejected, and whether *wholly or in part*." So in section 38 it is enacted that "it shall not be lawful for any Grand Jury, any law, usage, or custom to the contrary notwithstanding, to make a presentment for any public work whatsoever, or for raising any money, for which an application shall not have been made and approved at sessions either *wholly or in part*." In the same connection section 42 is of importance: it prescribes the duties of county surveyors, and among these I find it laid down that they are to attend at Presentment Sessions and upon the Grand Jury, and "that the said surveyor or surveyors, or one of them, shall also report on all applications on part of contractors"—this would include such an application as was here lodged on October 19th, 1893—"and on the progress and execution of all public works formerly presented, and the performance of all contracts . . . and the said surveyor or surveyors, or one of them, as the Grand Jury shall direct, shall audit all accounts of such works, and ascertain and certify the correctness thereof, and whether each contractor is entitled to payment, *and how far.*"

These three sections seem plainly to contemplate the practice that has been adopted in this case. Mr. Houston has however contended that the only power to deduct anything from a defaulting contractor is under section 54. This section enacts that the county surveyor is himself to cause the road to be repaired in the case of the contractor neglecting so to do, and that "the expense thereof shall be deducted and paid out of the sum which would be payable to such contractor if the road had been kept in proper repair." But I do not think that duty is imperative on the county surveyor, or that it is the sole remedy, though it might be in some cases a convenient one to adopt. Section 130, which is the section on which the other branch of the argument addressed to us mainly turns, enacts that when any application, like Doherty's in this case, comes before the Presentment Sessions they shall examine the surveyors and all other persons whom they think necessary for the purpose of ascertaining the due execution of the work, and shall "have and exercise all such powers and authorities as in the case of applications for presentments," and one of these powers is, as we have seen under section 17, to approve, "wholly or in part," what is submitted for their consideration. I cannot see in section 146, or section 17 of 19 & 20 Vict. c. 63, anything to contradict this view. I think this legislation contemplates a duty and power in the county surveyor to ascertain whether the contractor in whole or in part has performed the work, and a like duty and power in the Presentment Sessions to act on his certificate given, and therefore if this were the only objection to this presentment it would fail.

The objection which was raised by the Queen's Bench Division during the argument is the serious one. It comes to this—was it competent under the terms of this contract, having regard to the conditions necessary to be performed under the Grand Jury Act (section 130), to obtain at the Presentment Sessions of October, a certificate of the completeness of the work, and have the application for payment then passed, and a presentment for payment founded on this made at the Spring Assizes, 1894? The law is thus laid down by Lord Fitz Gerald in the *Ardfert Presentment* (1)—" The power of the Grand Jury is limited to approving or rejecting what has been done at the Presentment Sessions; they have no jurisdiction to originate a presentment of this nature; and therefore it is that, in arriving at a conclusion on this case, we must look at what was done at the Presentment Sessions. A presentment passed by the Grand Jury would be simply void if there had not been a previous application to the Presentment Sessions. Mr. Hickson contends that we should presume that everything was done rightly at the Sessions, and he relies on the short entry in the Crown Book, and says that we should hold that this presentment is good because there is no invalidity on the face of this entry. I apprehend that it is clear that the application at the Presentment Sessions forms part of the presentment: for what the Grand Jury have to exercise their judgment on is the application as it comes from the Presentment Sessions, and either to approve of or reject it." We are therefore remitted to the Presentment Sessions.

I agree that what was intended by the tender and presentment of 1893 was that Doherty should be paid at each successive assizes the sums of £37 2*s.* 6*d.*, the so-called half-yearly payments, till the contract was completed. But section 130 is so clear and precise that there is no getting out of it. [His Lordship read the section]. Under that section there are three things in a case like this, which form conditions precedent to a presentment for payment being made by the Grand Jury. First, the time for payment must have arrived; second, the work must have been done and so certified by the county surveyor; third, there must have been at Presentment Sessions an adjudication whether the work was done or not. All these conditions must have been fulfilled and all these matters gone into on the application at Presentment Sessions where the county surveyor's certificate is examined, and the claim allowed or disallowed, as the case may be. The presentment for payment by the Grand Jury is founded on what takes place at the sessions. And the section concludes by declaring that it shall not be lawful "for the Grand Jury or for the Court to allow any application which shall not have been approved of at such sessions; and no such contractor shall be entitled to payment who shall not have given such notice and made such application, nor unless such application shall have been approved and allowed as aforesaid, anything in any contract contained, or any law or usage to the contrary notwithstanding."

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(1) Ir. R. 3 C. L. 32.

Thus there are in section 130 both negative and affirmative words which prohibit us from holding that certificates could be given in advance, which certificates could not be true, and that there should be an adjudication at sessions on matters which had not, and from the dates could not have, assumed completeness.

It is wholly impossible to accede to the argument of Mr. Henry on section 52 on the words—"and also from time to time to present such sum or sums of money as shall be necessary for the execution of any of the above-mentioned works, and the payment of the person or persons with whom such contract for the execution of the same shall have been made." He said that under that the Grand Jury might present any broken sum up to October: but these words do not contemplate the authorization of a payment up to October, 1893; they merely authorize the raising of money to meet payments in proper cases.

The extension of the time for giving of the certificates up to the Presentment Sessions under 7 Wm. 4 & 1 Vict. c. 2 is rather against the appellant's case than otherwise.

Upon the whole, once this question has been formally raised I see no escape from the necessity of holding, as the Queen's Bench Division has done, that the presentment and the practice founding it are illegal. I therefore think the appeal must be dismissed.

PALLES, C.B. :—

As the Judges of Assize who *fiated* the presentment are a Superior Court, that presentment cannot be quashed unless it is bad on the face; but as the jurisdiction is a statutable one it will be bad on its face if all the facts necessary to bring it within that statutable jurisdiction do not appear on its face: *Gossett* v.

Howard (1). The jurisdiction of the Grand Jury is limited by sect. 130 of 6 & 7 Vict. c. 116 to allowing or disallowing such applications as have been approved of at Presentment Sessions; and the joint effect of that section and sect. 16 of 7 Wm. 4 & 1 Vict. c. 2 is that these sessions have no jurisdiction to approve of the application, unless there be a ten days' notice of application for payment, and unless the certificate of the county surveyor, of the due performance of the contract, is produced at the sessions. It is clear, therefore, that the presentment must be taken to embody the notice of application, the contract, and the certificate.

This is substantially the line of reasoning of Mr. Justice O'Brien and Lord Fitz Gerald in the *Ardfert Presentment Case* (2); and I have no hesitation in adopting it; but I do not concur in the proposition mentioned in the head note of that case, that where the objection to a presentment is that the Grand Jury had no jurisdiction to make it, such want of jurisdiction can be shown by affidavit. None of the Judges in that case, except Whiteside, C.J., based their judgments on such a proposition; and the observations in reference to it of the Chief Justice (who had given other sufficient legal grounds for his decision), and the judgment of Crampton, J., in *Ex parte Henn* (3), upon which the Chief Justice relies, assume that the Judges of Assize are an inferior Court, a position which, since *Fernandez' Case* (4), and especially since our Judicature Act, cannot be maintained.

Both the objections relied upon being thus open, without resorting to the affidavits, I proceed to consider them.

The first, which was the only one relied upon before Andrews, J., on circuit, was that the Grand Jury had not jurisdiction to present for, nor had the county surveyor power to certify for, any sum less than the entire instalment which would have been then payable had the contract been duly performed. This objection presupposes the period for payment to have arrived, and deals with amount only. It was overruled by Andrews, J., and it was not made the *ratio decidendi* by any of the Judges in the Queen's Bench Division.

I agree with Andrews, J., that the Grand Jury may lawfully make an order for payment *of part*, on the certificate of the county surveyor "that the work has been duly executed according to contract" *to the amount of that part.*

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(1) 10 Q. B. 359.
(2) Ir. R. 3 C. L. 31, 33.
(3) 6 Ir. C. L. R. 239.
4) 9 C. B. (N. S.) 3.

Section 42 enacts that the county surveyor shall attend at each Presentment Sessions, and "report on all applications on part of contractors, . . . and on the performance of all contracts, . . . and whether such contractor is entitled to payment, *and how far.*" Further, sect. 130 empowers the Presentment Sessions "to examine into all such applications for payment on the part of such contractors, and inspect the notices thereof, and the certificates aforesaid, and examine the surveyor . . . and all other persons whom they may think it necessary to examine for the purpose of ascertaining the due execution of the work or matter contracted for, and shall therein have all such powers and authorities as in the case of applications for presentments." We are thus referred back to sect. 17 to ascertain these powers, and they include deciding, by a majority of voices, upon the application, and whether the same ought to be adopted or rejected, and *whether wholly or in part.*

These provisions satisfy me that the words "certificate of the due performance of such contract" must be read distributively, and that the county surveyor may give a certificate of "due performance" for *part* of the period, or of *part* of the work contracted for, and certify "*how far*" the contractor is entitled to payment.

I have said so much as to the first objection argued, as the practice of giving certificates for sums less than the entire amount is so prevalent that it is essential that its legality should, once for all, be definitely decided; and all the members of this Court do, as I understand, now so decide.

The remaining question is whether the contractor was, when he served his notice, "entitled to payment" "by the terms of such contract," within the meaning of sect. 130, of the instalment, or of the portion thereof which has been presented.

For the reasons given by the learned Judges of the Queen's Bench Division, I am of opinion that he was not so entitled; and it is unnecessary that I should add anything to what has been said by them and by the Lord Chancellor. I may observe, however, that the reasoning by which I have arrived at the conclusion that the invalidity appears on the face of the presentment does not necessarily apply to any instalment of a road maintenance contract, except the first and last. I desire also, to prevent misapprehension, indeed to prevent the dismay which, to my knowledge, the decision has created in the minds of some experienced Grand Jurors, to state in the clearest way that the invalidity arises, not from any insurmountable difficulty which would arise from the Grand Jury laws, were the forms of contracts used by the Grand Jury prepared by gentlemen of legal skill, but on account of the crude form adopted in the present case, which I have no doubt failed to carry out the common intention of all parties—contractor, county surveyor, Presentment Sessions, and Grand Jury.

I agree that the decision of the Queen's Bench Division should be affirmed.

FITZ GIBBON, L. J. :—

The essence of the maintenance contract before the Court appears to me to be that it was intended to cover a continuous period of five years, which, for convenience, I call ten Assizes. The intention of the parties and the terms of the contract can be satisfied only by payments to be made at ten consecutive Assizes.

Beginning at the Summer Assizes of 1893, the presentment plainly entitles the county to have the road kept in repair until the Summer Assizes of 1898. In short, we have a contract to keep the road in repair from July 1, 1893, to June 30, 1898. It will be obviously impossible to comply with section 130 before the Spring Assizes of 1899, because there is work to be done down to the last day of June, 1898, and the Grand Jury could make no order for payment of the final instalment without having before them the order of the Presentment Sessions, and the certificate of the county surveyor. As the ten Assizes were intended to be consecutive, it follows that if the last payment cannot be made until the Spring Assizes of 1899, the first cannot be made until the Summer Assizes of 1894.

It might have been possible to twist the terms of the contract so as to make the first payment at the Spring Assizes of 1894, basing it on a certificate for work done up to the date of the Presentment Sessions in October, 1893, but such a result would not have been in accordance with the real intention. As it is impossible to make the last payment before Spring, 1899, and the Assizes at which the

Appeal.
1895.
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Fitz Gibbon, L.J.

payments are to be made are to be consecutive, we must rule that the first of those Assizes is that at which the contractor can first produce a certificate that he has kept the road in order for the half-year completed before the Presentment Sessions which sanction the payment. The effect is simply to push forward the period of payment of all maintenance contracts by one Assizes—in other words, to make every contractor who takes a maintenance contract carry out his contract for six months on credit.

We are all of opinion that the county surveyor can "dock" the contractor if the work is not properly done. It is not a case of "neck or nothing." If the road has not been kept in repair completely to the satisfaction of the surveyor, he can certify for the amount which has been fairly earned.

Barry, L. J.:—

I entirely concur. The case is a curious one in this respect. It was brought to test a matter said to be of great importance to the ratepayers, viz. whether the Grand Jury have power to present for payment of part of a maintenance contract, and to re-present the balance. But while this point was being discussed in the Queen's Bench Division another point cropped up—and the latter is the only one on which that Court gave its decision —the point as to whether the Grand Jury can present for work not yet done on a certificate which, though innocently given, and made for the purpose of getting over an inconvenience, still is false. Once this point arose, no matter what difficulties the decision might involve, it was inevitable in what way it must be decided. I concur in the judgment of my colleagues, and in the opinion expressed that the Grand Jury have power to present for part of the sum applied for.

Walker, C.:—

We give no costs of this appeal. M'Intosh brought the case in order to raise a point which we have decided against him; he had no intention of having the presentment quashed on the grounds on which we have been constrained to pronounce it bad.

Solicitor for the appellant: *R. H. Todd.*
Solicitor for the Grand Jury: *B. H. Lane.*

G. Y. D.

REG. (SANDS) *v.* JUSTICES OF COUNTY ARMAGH (1)

Q. B. Div.
1895.
June 24.

Justices—Appeal—Petty Sessions (Ireland) Act, 1851, *sect.* 24.

An appeal from an order made by Justices at Petty Sessions must, under the 24th sect. of the Petty Sessions (Ireland) Act, 1851, be taken to the Sessions which are held first after the order, in case of there being more than one Quarter Sessions town in the Division.

MANDAMUS.

MOTION for a *mandamus* addressed to the Justices of Armagh to compel them to hear an appeal under sect. 24 of the Petty Sessions (Ireland) Act, 1851.

The facts were as follows:—At the Petty Sessions held at Newtownhamilton, in the County of Armagh, on the 14th January, 1895, the applicant was convicted of an assault, and fined £1 1*s*. Notices of intention to appeal were duly served, and the usual recognisances entered into. The Easter Quarter Sessions for the Markethill Division of the County Armagh (in which Newtownhamilton is situate), were held in Ballybot and Markethill on the 16th and 20th April, respectively. The notice of appeal was for the later date at Markethill. The magistrates, when the case was called on, decided that the appeal against the said order of the 14th January, not having been properly presented, should be struck out.

John Bartley, in support of the motion.

G. D. Keogh, for the Justices.

The following cases were referred to:—*Reg.* v. *Finnucane* (2); *Reg.* (*Sides*) v. *M'Garvey* (3); *Reg.* (*Farquharson*) v. *Justices of Antrim* (4).

SIR P. O'BRIEN, C.J.:—

It appears that the order appealed from was made at the Newtownhamilton Petty Sessions on the 14th January, 1895. That town is in the same Civil Bill Division of the County Armagh as the two towns of Ballybot and Markethill, at the latter of which the appeal came on for hearing. The question is whether the appellant was right in bringing it to that town, and not to the town of Ballybot, where the Easter Sessions had commenced on the 16th April, that is, four days earlier. I think, on the 24th section of the Petty Sessions Act, he was wrong. The section is as follows:—[His Lordship then read the 24th section.] I understand "the next Quarter Sessions" to mean the next *sitting* of the magistrates at Quarter Sessions in the Division in question. The appeal was not brought to the next sitting, but the appellant chose the second place at which the Quarter Sessions were held. I therefore think that the application should be refused.

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(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN and HOLMES, J.J.

(2) Ir. R. 9 C. L. 408. (3) 25 Ir. L. T. R. 25. (4) 8 Ir. Jur. (N. S.) 47.

O'BRIEN and HOLMES, JJ., concurred.

Solicitor for the appellant: *P. J. O'Rorke.*
Solicitor for the Justices: *P. Coll.*

J. H. P.

Appeal.
1894.
Nov. 2, 5, 6.

STEVENSON, LANDLORD; PARKER, TENANT (1).

Land Law Act—Covenant against alienation—Statutory prohibition—7 Geo. 4, c. 29 (Ir.).

By lease, dated the 2nd April, 1827, the lands of Kilgreel in the county of Antrim, containing 60A. 2R. 6P., were demised to B. for three lives, or thirty-one years, and the lease contained a covenant against alienation without the consent in writing of the lessor. By an agreement in writing, dated the 19th December, 1856, S. (in whom the interest of B. was vested) agreed to grant to M. P., the elder, portion of the said lands, comprising 10 acres, for seven years from the 1st November, 1856, at the rent of £30. M. P. the elder continued in possession down to the date of his death, which happened in 1877, and after his death M. P., his eldest son, remained in possession, paying the rent and receiving the receipts in his own name. There was no evidence given by either landlord or tenant as to whether the head landlord had consented in writing, or at all, to the subletting to M. P. the elder, or that the subletting ever came to his knowledge. On the 30th April, 1892, M. P. served a notice to fix a fair rent upon S., which was dismissed by a Sub-Commission. On appeal the Land Commission, being of opinion that it was competent for them to presume that a deed had been executed releasing the covenant, reversed this decision. On a case stated for the Court of Appeal:—

Held (reversing the decision of the Land Commission), 1, that it was not competent to presume that a deed had been executed releasing the covenant; and 2, such a release would not affect the prohibitive clause in the statute 7 Geo. 4, c. 29.

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(1) Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZGIBBON and BARRY, L.JJ.

Case Stated by the Land Commission.

The landlord, Thomas Stevenson, held this holding along with other lands, containing in all 60a. 2r. 6p. statute measure, under the Rev. Arthur Pakenham, by lease dated the 2nd April 1827, for the term of three lives or thirty-one years. The lease contained a covenant not to alien, set, or assign the whole or any part of the lands without the consent under the hand and seal of the landlord.

By an agreement in writing dated the 19th December, 1856, made between the said Thomas Stevenson of the one part, and Matthew Parker the elder, the father of the tenant, the landlord agreed to grant, and Matthew Parker the elder agreed to accept, a lease of the present holding comprising 10 acres for seven years from the 1st November, 1856, the rent to be £30, and the landlord to pay all taxes. Matthew Parker continued in possession of the holding after the expiration of the period of seven years, and down to the date of his death, which occurred in 1877. After his death Matthew Parker, his eldest son, remained in possession at the rent of £30 a-year, obtaining the rent receipts in his own name.

There was no positive evidence given by either landlord or tenant as to whether or not the head landlord had consented in writing or under seal, or at all, to the subletting to Matthew Parker, the elder, or the present tenant, nor was it proved that such sub-letting ever came to his knowledge. On the 30th April, 1892, the tenant served an originating notice to fix a fair rent, which was dismissed by a Sub-Commission by an order dated the 24th June, 1893. The tenant by notice dated the 1st August, 1893, required his case to be re-heard. The Land Commission were of opinion that it was competent for them under the circumstances to presume that a deed had been executed by the head landlord releasing the covenant against sub-letting at a date prior to the 19th November, 1856, or that a consent to this subletting had been given by him under his hand and seal. They accordingly found that such a deed had been executed, or such a consent had been given, and were of opinion that the order of the Sub-Commission should be reversed, and the case remitted to them to fix a fair rent, but they submitted for the decision of the Court of Appeal the question—Whether they were at liberty on the facts stated to presume that either such a deed of release had been executed or such a consent under hand and seal had been given?

Campbell, Q.C., and *R. F. Harrison*, for the landlord:—

If the lessee of a lease not containing a clause permitting alienation, and made after the 1st June, 1826, sublets any part of the demised premises without such consent as required by 7 Geo. 4, c. 29, the sub-lease so made is void, and not merely voidable at the election of the original lessor: *Troy* v. *Kirk* (1); *Bowman* v. *Catherwood* (2). Mere standing by with knowledge is not consent: *Doe* v. *Allen* (3); *Willmott* v. *Barber* (4). Moreover the head landlord is not here, and this decision would bind him. Lost deeds have only been presumed *inter partes.* The rule as to waiver does not apply where there is a continuing breach: *Tennent* v. *Neil* (5). But the deed releasing the covenant would be of no avail, as the provisions of sect. 3 of 7 Geo. 4, c. 29 would apply. [They referred to *Coffey's Estate* (6); *Jagoe* v. *Harrington* (7); *Meares* v. *Redmond* (8).]

Hynes, for the tenant:—

The *onus* of proof is on the person who asserts the illegality, and not on the sub-tenant. There is a presumption in favour of legality: *Gibson* v. *Doeg* (9); *Toleman* v. *Portbury* (10); *Hire Purchase Furnishing Company* v. *Richens* (11). If the sub-letting has existed for forty years the Court will assume a lawful origin: *Bell* v. *Dyot* (12). Consent will be assumed from acquiescence: *Rankin* v. *M'Murtry* (13). If parties have dealt with each other for a number of years upon different terms from those of the actual lease, that is evidence of a surrender or a new deed of grant: *Lefroy* v. *Walsh* (14); *Gray* v. *Bond* (15); *Ward* v. *Day* (16); *Winterbottom* v. *Derby* (17). The Court might presume a release of the covenant from acts of alienation.

(1) 1 Al. & Nap. 326.
(2) 28 L. R. Ir. 572.
(3) 3 Taunt. 78.
(4) 15 Ch. Div. 96.
(5) Ir. R. 5 C. L. 418.
(6) Ir. R. 4 Eq. 47.
(7) 10 L. R. Ir. 335.
(8) 4 L. R. Ir. 533.
(9) 2 H. & N. 615.
(10) L. R. 5 Q. B. 288.
(11) 20 Q. B. Div. 387.
(12) M'Devitt's Land Cas. 406.
(13) 24 L. R. Ir. 290.
(14) 1 Ir. C. L. R. 311.
(15) 2 Br. & Bing. 667.
(16) 4 B. & S. 337.
(17) L. R. 2 Ex. 316.

Appeal.
1894.
Stevenson, *Landlord;* Parker, *Tenant.*
Nov. 6.

Walker, C.:—

This case stated refers to and partially sets forth a head-lease dated the 2nd April, 1827, made by the Hon. Hercules Robert Pakenham to Joseph Barron.

By this lease the holding in question with other lands were demised to the lessee for a term of three lives or thirty-one years at the yearly rent of £39 6*s.* 10*d.* and it contains the following clause:—"Provided always that these presents are granted upon this express condition that if the said Joseph Barron, his heirs, executors, administrators, or his or their assigns, if he or they shall be permitted to assign, or any of them, shall assign, alien, sell, mortgage, or dispose of, his or their interest or term in the hereby demised premises, or any part thereof, or set any part or parcel thereof, to any person or persons whatsoever save and except to the wife, child, or children of the said Joseph Barron, his heirs or assigns, without the consent of the said Hercules Robert Pakenham, his heirs or assigns, first thereunto had under their hands and seal, that then and from thenceforth this present demise shall be utterly void at the election of the said H. R. Pakenham, his heirs and assigns, and it shall and may be lawful to and for the said H. R. Pakenham, his heirs and assigns, into the said demised premises and every part and parcel thereof to re-enter, and the same to have again, re-possess, and enjoy, as in his or their former estate, anything herein contained to the contrary in anywise notwithstanding."

On the 19th December, 1856, Thomas Stevenson, in whom the lessee's interest was then vested, entered into an agreement with Matthew Parker for a lease of 10 acres of the demised lands with the houses, outhouses, and other buildings thereon, with the exception of the house thereon occupied by the herd of Stevenson and a stable adjoining, and which were to be retained by Stevenson in his possession, at the rent of £30; and it was provided that the term of the lease should be seven years to be computed from the 1st November, 1856, provided John Thompson, Richard Thompson, and Samuel Thompson, and the survivor of them, being the lives in the lease by which Thomas Stevenson held the lands should so long live, thus expressly referring to the head-lease.

Matthew Parker entered into possession under this agreement,

Appeal.
1894.

STEVENSON, *Landlord;* PARKER, *Tenant.*

Walker, C.

and so continued till the expiration of the seven years, and held on afterwards, paying the reserved rent, till his death some seventeen years ago, when his son the present tenant succeeded him in the possession and occupation; and on the 30th April, 1892, he served an originating notice on Stevenson to fix a fair rent.

It will be observed that the lease to Stevenson being made between the 1st June, 1826, and the 1st May, 1832, is governed by the provisions of the 7 Geo. 4, c. 29, the stringent terms of which I shall read presently.

On the hearing before the Head Commission it was contended on the part of the landlord, Stevenson, having regard to the 7 Geo. 4, c. 29, that the relation of landlord and tenant did not exist between him and Parker.

What took place in the way of proof or evidence is thus stated in the case by which we are bound. "There was no positive evidence given by either landlord or tenant as to whether or not the head landlord had consented in writing, or under seal, or at all, to the sub-letting to Matthew Parker, the elder, or the present tenant, and it was not proved that such sub-letting ever came to his knowledge."

On this state of facts the Land Commission Judges were of opinion that it was competent for them, under the circumstances, to presume that a deed had been executed by the head landlord, releasing the covenant against sub-letting at a date prior to the 19th December, 1856, or that a consent to this sub-letting had been given by him under his hand and seal, and they submit to us the question—Whether they were at liberty on the facts stated to presume that either such a deed of release had been executed, or such a consent under hand and seal had been given?

Now what are we asked to presume against? It is against the express words and policy of a statute of the most stringent kind. [His Lordship read section 1 of 7 Geo. 4, c. 29.]. Then follow the well-known decisions in this country, that sub-letting without the prescribed authentication is made unlawful.

The special modes in which it shall be authenticated are prescribed, and neither constructive nor parol waiver of the provisions of the Act can be relied on by the alleged sub-lessee.

The present case is not one of conduct getting rid of contracts, but of a prohibitive statute with the annexed declaration I have stated.

We are not dealing here with the clause of re-entry, but with the statutory prohibition against Stevenson sub-letting unless Pakenham signs and seals the sub-lease or indorses on it his ratification, coupled with the enactment that parol or constructive waiver of these requisitions shall not aid the alleged sub-lessee.

It seems to me, in the first place, that the lease in this case, subsequent as it is to the 7 Geo. 4, c. 29, excludes such a presumption as suggested. Then further if the covenant (if there be a covenant) were released, how would that aid the tenant? It would then be a lease silent as to sub-letting, but still subject by statute to all the restrictions in 7 Geo. 4, c. 29. That is what is pointed out by the Chief Baron in his judgment in *Meares* v. *Redmond* (1). The second supposed presumption is of a consent under the hand and seal of Pakenham. I do not see how that would aid. It might be an answer to an ejectment for a forfeiture of the tenancy of Stevenson. But supposing it would aid, in the first place there is no trace of such presumption being ever successfully put forward, though there have been thousands of hard cases under these Acts when juries would have gladly grasped at such a defence. The suggestion did not receive any favour either in *Meares* v. *Redmond* (1), or in *Robinson* v. *Wakefield* (2).

The presumption is sought to be made against Pakenham, not a party to the litigation, without evidence or knowledge on his part of the existence of the sub-letting.

Such cases as *Tennent* v. *Neil* (3), and *Gibson* v. *Doeg* (4), were cases *inter partes* presuming, from conduct, deeds to get rid of contracts, which contracts the two parties had acted in disregard of. I do not think these cases apply to the position of Pakenham, protected by the policy and words of the 7 Geo. 4, c. 29. At all events, upon the evidence or want of evidence which this case finds, I am not to be understood as expressing an opinion that a deed can in no case be presumed which would get rid of the

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(1) 4 L. R. Ir. 533.
(2) 30 L. R. Ir. 547.
(3) Ir. R. 5 C. L. 418.
(4) 2 H. & N. 615.

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1894.
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Walker, C.

provisions of the sub-letting Acts. In addition to what I have said, I do not think we could answer the questions in the affirmative unless we were prepared to hold that the middleman would have the same rights of presumption in his favour against the head landlord. Upon the whole, confining myself to the case before the Court, I am of opinion that it was not competent to make either of the presumptions with which this case is conversant, and that we should answer in the negative the questions put to us.

Lord Justice Barry, who is unable to be present to-day, concurs in this judgment.

SIR PETER O'BRIEN, C.J. :—

I entirely agree with the judgment of the Lord Chancellor, and for the reasons he has given. At a very early stage of the argument I ventured to suggest that the case was governed by the statute 7 Geo. 4, c. 29. I am still of opinion that it is governed by that statute. It is not a question of contract merely; it is a question of a prohibitive statute; and certainly the prohibition in the statute cannot be got rid of in the case before us in the manner suggested. I retain the opinion I formed and expressed at an early stage of the argument.

FITZ GIBBON, L.J. :—

I agree that the statute of 7 Geo. 4, c. 29, both makes any presumption in favour of the occupier in this case impossible, and also shows that neither of the presumptions suggested by the Land Commission would do him any good. But the short period during which that statute was in operation, and its special provisions, would render a decision based upon it alone very narrow in its operation, and somewhat technical and strict; I therefore think it right to say that, as at present advised, I should hold that the tenant fails on wider grounds. The same degree of illegality appears to me to attach to sub-lettings not governed by that statute, when they are made in violation of express provisions such as the lease here contains. Therefore, the series of authorities ending with *Gillman* v. *Murphy* (1) would have fatal effect upon the occupier's *status* here, even if the lease was outside the statute of Geo. 4.

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(1) Ir. R. 6 C. L. 34.

We are asked "Whether we were at liberty, *on the facts hereinbefore stated*, to presume that either a deed of release had been executed, or such a consent under hand and seal had been given?" The Lord Chancellor has pointed out that the only release which this question presumes must have been a release of the covenant against subletting executed by the head landlord before December 19, 1856, and that the presumed consent must have been a consent under hand and seal, in the form and according to the provisions of the statute. A mere release would do no good, because it would leave the statutory prohibition still in operation, and therefore neither release nor consent could validate the subletting, unless it was indorsed upon the lease. That document is forthcoming, and it bears no such indorsement. Therefore the presumption is rebutted conclusively by looking at the lease. This ground of decision has already been put by the other members of the Court, and *Bowman* v. *Catherwood* (1) must be overruled before an illegal and void subletting can be turned into a statutory tenancy.

But apart from this, what are "the facts hereinbefore stated?" They appear in paragraph 4 of the case. "There was no *positive evidence* given, by either landlord or tenant, as to *whether or not* the head landlord had consented in writing, or under seal, *or at all*, to the subletting to Matthew Parker the elder, or the present tenant; and it *was not proved that such sub-letting ever came to his knowledge*." "Positive" means actual, and therefore the statement amounts to this, that there was no evidence of consent to the subletting. "It was not proved" can only mean, to a lawyer, that "there was no evidence" that the sub-letting ever came to the landlord's knowledge, and the *onus probandi* was on the tenant. I hold that the only recognised basis of presumption in such a case as this is *acquiescence*, and acquiescence implies, at least, knowledge. I think that the doctrine which makes acquiescence binding in equity is founded on fraud, and on the inequity of insisting upon a legal right, after standing by while another

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(1) 28 L. R. Ir. 572.

Fitz Gibbon, L.J.

party has changed his position in the *known or reasonably inferred* belief that the right did not exist, or was not to be exercised. "On the facts stated" here no reasonable juror could find—no jury could be permitted to find—that a deed had been executed.

There is even a further difficulty. Upon the decisions on the Land Act itself we could not hold that this under-tenant can fix a fair rent against a middleman as upon a sub-letting with consent, unless we were prepared to hold that, if the middleman had applied to fix a fair rent against his landlord, he would have been within the saving clause of the 57th section, and entitled to "be deemed to be still in occupation," as having "sublet with the consent of his landlord." There we are met by *Thomson* v. *Rossmore* (1) and all the other decisions, that the tenant must give evidence of "active consent," and that mere inaction or absence of evidence will not do. Yet the case finds that there was no positive evidence of consent on the part of the landlord, and no evidence even of his knowledge. In the particular case the subletting was by agreement merely; it covered only part of the land, and the lessee retained possession of buildings on the part sub-let. The landlord may easily have been entirely ignorant of any possession by the sub-tenant. It appears to me that on each of the grounds which I have mentioned the answer to the question must be distinctly in the negative. The "presumption" is based on no evidence; a jury could not make it, and it therefore cannot be made by the Land Commission.

Solicitor for the landlord: *Robert H. Orr.*
Solicitors for the tenant: *Thompson & Ross.*

R. D. M.

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(1) 32 L. R. Ir. 431.

GRAYDON *v.* TRUSTEES OF MORGAN'S CHARITY (1).

Appeal.
1894.
June 28.
1895.
Feb. 1.

Demesne land—Trustees of a charitable institution, landlords—Undemesning—Land Law (Ireland) Act, 1881 (44 *&* 45 *Vict. c.* 49).

M., who was possessed of extensive estates in Ireland, including the lands of N. in the county of Dublin, held under lease for lives renewable for ever, by his will, dated the 10th March, 1783, devised all his real estates and other property to trustees, including the Lord Primate of Ireland, the Lord Chancellor of Ireland, the Archbishop of Dublin, the Chief Justices of the King's Bench and Common Pleas, the Chief Baron of the Exchequer, and other official persons, for certain charitable purposes. The will was disputed by the heir-at-law, but by an agreement the property was divided between the trustees and him. In the lifetime of M. the lands of N. were demesne lands; but the property which he devised to the trustees of his will was to be used solely for charitable purposes. While the litigation was pending a lease was made to A. G. in 1786 of the lands of N., which were afterwards allotted to the trustees of the charity, and further leases were made by the trustees to A. G. and his successors, in whose family the holding had always remained. The last lease was dated the 4th December, 1878, for the term of twenty-one years, and all the leases described the holding as that part of the lands of N. "commonly called the mansion-house, garden, and demesne of N." The last lease contained, besides the usual covenants, a covenant that the lessee would reside on the lands, a covenant not to build more than one dwelling-house on the premises, and a covenant not to make any claim for disturbance or improvements:—

Held, by Walker, C., Porter, M.R., and Barry, L.J. (affirming the decision of the Land Commission), *diss.* Palles, C.B., and FitzGibbon, L.J., that the lands had been undemesned.

By indenture dated the 5th February, 1723, Hugh Henry demised to John Neville the lands of Newcastle in the county of Dublin, containing 255 acres for three lives with a covenant for perpetual renewal at the rent of £150. The lease was renewed by an indenture dated the 6th August, 1764, from Joseph Henry to Richard Neville. The estate of Richard Neville became vested in Richard Morgan, a gentleman possessed of extensive estates in the county of Dublin and elsewhere. He died on the 28th December,

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(1) Before Walker, C., Porter, M.R., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

1784, having made a will dated the 10th March, 1783, by which he devised all his real estates and other property to trustees, including the Lord Primate of Ireland, the Lord Chancellor of Ireland, the Archbishop of Dublin, the Chief Justices of the King's Bench and Common Pleas, the Chief Baron of the Exchequer, and other official persons, for certain charitable purposes. The will was disputed by his heir-at-law, John Godley, who was his nephew, and ultimately an agreement was come to, by which the property was to be equally divided between John Godley and the trustees of the charity. For the purpose of carrying this out an Act was passed by the Irish Parliament in 1793, 33 Geo. 3, c. 27.

In the life time of Richard Morgan, these lands were all demesne lands, but the portion taken by the trustees of Morgan's schools was to be used solely for charitable purposes. While the litigation was pending a lease was made to Alexander Graydon dated the 22nd June, 1786; subsequently further leases were made by the trustees to Graydon and his successors in title, and the holding had remained in his family from that time to the present. For some time the lands were out of lease, but the Graydons continued in possession under promise of a lease. In 1837 another holding was added, called the Hill Farm, containing about 45 acres. The whole was included in a lease made by the trustees on the 1st July, 1857, for twenty-one years, in which the premises were described as "that part of the lands of Newcastle, late in the possession of Alexander Graydon senior, and now in the possession of Alexander Erasmus Graydon, commonly called the mansion-house, garden, and demesne of Newcastle," and they contained 181A. 3R. 6P. statute measure, and the rent reserved was £390 a year. The lease reserved to the landlords all timber and other trees, woods, plantations and underwoods except such trees as were registered by Alexander Graydon upon the 24th December, 1821. A new lease was made on the 4th December, 1878, for a further period of twenty-one years, in which the lands were described in the same way, and the lease contained a covenant that the lessee would reside on the lands, a covenant against alienation and sub-letting, a covenant not to build more than one dwelling-house with suitable out-offices on the premises, and a covenant to use all the manure on the premises, and a covenant not to make any claim for disturbance or improvements. The valuation of the whole was £248 5*s.*, of which £221 was on the lands, and £27 5*s.* on the buildings; on the portion commonly called demesne lands of Newcastle, the valuation was £147 15*s.* The townland in which the lands were situated was called Newcastle demesne. The trees on the holding were all planted by the tenant or his predecessors, and were duly registered. In 1852, the tenant was seeking to get a reduction of the rent, and on that occasion a letter was written by Mr. Hamilton, the agent of the landlord, to the tenant on the 9th December, 1852, in which he stated—"I laid before the trustees the report I made on the farm at Newcastle. They are willing to lease to you at the present rent but do not consider that any reduction is called for as the house is not valued but merely the land." The Sub-Commission fixed a fair rent for the holding, the Land Commission affirmed their decision, and from that the landlords appealed.

F. A. P. Hamilton (with him *C. Matheson, Q.C.*), for the landlords:—

These lands were demesne in the hands of Richard Morgan, and the only question is, have they been undemesned? we submit that they have not, and the only ground for holding so is that they are in the possession of a corporation. Had this portion of the lands come to John Godley in the partition there would have been no question; as it is, the fact of a corporation being the landlords does not alter the character of the holding. The lease contains clauses which show that it was intended to be demesne—the covenant that the tenant was to reside on the holding, and the covenant against erecting further buildings, and a covenant not to make any claim for improvements. Moreover the house is a handsome structure suitable for the residence of a country gentleman.

Bushe, Q.C., and *Wakely*, for the tenant:—

The trustees of a charity cannot hold demesne lands, and Richard Morgan by leaving the lands to trustees has undemesned them. A demesne must be the demesne of the landlord. The user of the lands shows they are not demesne. Graydon was a salesmaster, and he made improvements amounting to the sum of £3000, £2300 of which was on the house. The series of acts of

Appeal. 1894.

GRAYDON *v.* TRUSTEES MORGAN'S CHARITY.

the parties dealing with the property as told in the documents, shows that these lands were dealt with as ordinary agricultural lands.

Cur. adv. vult.

1895. Feb. 1.

WALKER, C.:—

This is an appeal from the Land Commission, and the only question argued was whether the lands are demesne lands within the exception of the Land Acts. They are held under a lease dated the 4th December, 1878, made by a charitable corporation, the trustees of Morgan's Charity schools to Alexander Graydon for a term of twenty-one years at the yearly rent of £390. The acreage is 181A. 3R. 6P. statute measure, and we have been furnished during the progress of the case with fuller information as to the title than was laid before the Court below.

The title to the landlord's interest appears to be the following:—By lease dated the 5th February, 1723, Hugh Henry demised to John Neville all that and those the town and lands of Newcastle, containing 255 acres, to hold for lives renewable for ever at the yearly rent of £150 and a peppercorn fine. This lease was renewed on the 6th August, 1764: no further renewal or fee-farm grant appears to have been taken out. The interest in this lease subsequently became vested in Richard Morgan, and it would seem that he built on the lands, a house called by him Newcastle House, and attached a demesne to it. Richard Morgan died on the 28th December, 1784, without issue, leaving John Godley his heir-at-law, and having made a will dated the 10th March, 1773, whereby he devised large estates, including these lands of Newcastle, in trust for charitable purposes. The will was disputed, and pending the suit, an agreement of the 17th April, 1792, was entered into between the heir and the trustees to divide the estates. An Act of Parliament was passed of 33 Geo. 3, c. 27, to confirm and carry out this agreement, and by it all Richard Morgan's estates were vested in the Archbishop of Armagh, the Lord Chancellor, the Archbishop of Dublin, the Chief Justice of the King's Bench, the Chief Justice of the Common Pleas, the Chief Baron, and John Godley, subject to the leases of the premises, upon trust as to one moiety for John Godley and as to the other moiety for the charitable uses and purposes mentioned in the will of Richard Morgan, subject to one moiety of his debts, and of the annuities and legacies in his will, and the expenses of obtaining the Act.

By this Act the trustees were incorporated under the name of the trustees of Morgan's Charity Schools. One of the leases saved by the Act and agreement would appear to be a lease dated the 22nd June, 1786, made by John Godley to Alexander Graydon, pending the litigation. There is nothing before us to show whether the lands had been in lease before.

The estates devised by Richard Morgan were very extensive, and situated in different parts of Ireland, and it is plain that a partition must have been made between Godley and the corporation, because the lands in question came into the exclusive ownership of the trustees, who, as a corporation formed for educational and charitable purposes, became the reversioners on Godley's lease.

By that lease, dated the 22nd June, 1786, John Godley demised to Alexander Graydon all that part of the lands then in the possession of Alexander Graydon, commonly called the mansion-house, gardens, and out-offices of Newcastle, together with that part of the demesne called the house range, to hold for a term of thirty-one years, together with the use of the fixtures then in the mansion-house of Newcastle and out-offices. The lands as described in the map appear to have contained 81A. 0R. 10P. Irish plantation measure. The lease contained a reservation of timber, and a covenant against breaking up any portion of the lands except certain specified parts. That lease expired in 1817, and it would seem that Alexander Graydon held on after its expiration, and that his son obtained a new lease in 1857.

By that lease, dated the 1st July, 1857, the trustees of Morgan's Charity Schools demised to Alexander Erasmus Graydon the lands contained in the lease of 1786, and also additional lands, by the description of "all that part of the lands of Newcastle, late in the possession of Alexander Graydon, senior, and then in the possession of the lessee, commonly called the mansion-house, gardens, and demesne of Newcastle, containing in the whole 184A. 0R. 11P. statute measure, equivalent to 113A. 2R. 22P. Irish, to hold for a term of twenty-one years, at the yearly rent of £270. This lease contained a reservation of timber, also a covenant to reside on the premises, and not to build on them more than one dwelling-house, or allow any cabin to be erected; also not to break up or till more than 40 acres, Irish measure. That lease expired in 1878, when Alexander Erasmus Graydon obtained a new lease from the corporation.

By that lease, dated the 4th December, 1878, the trustees of Morgan's Charity Schools demised to Alexander Erasmus Graydon all that part of the lands of Newcastle, formerly in the possession of Alexander Graydon, senior, commonly called the mansion-house, gardens, and demesne of Newcastle, containing in the whole 181A. 3R. 6P. statute measure, equivalent to 112A. 0R. 37P. Irish, to hold for the term of twenty-one years, at the yearly rent of £390. This lease contains covenants such as one might expect to find in an ordinary agricultural lease, and also a covenant not to make any claim for compensation for disturbance or improvements (unless with consent) under any of the clauses of the Act of 1870.

The trustees contend that the lands or a substantial portion of them are demesne lands and excluded from the Land Acts. It is plain, I think, that they were demesne while in the ownership of Richard Morgan, and the description of the mansion-house and demesne of Newcastle was then in every respect apposite; but the question is—Did the lands remain so? and are they now demesne lands in the ownership of the charitable corporation and their tenant? It would not be unnatural to find that the former description would adhere to them even if the real character were changed, and in such case the description "commonly called the demesne lands of Newcastle" would be also a natural description.

We are not embarrassed here by the question whether it was the demesne of the head landlord. The lease of 1723 does not describe the lands as demesne, and it seems that it was Morgan who built the house. The question is, therefore—Did Morgan, who created the demesne, undemesne the lands by his acts? It has been repeatedly held that it is competent to undemesne lands. I shall apply the test put by the Lord Chief Baron in *Moore* v. *Batt* (1). Is there "a clear affirmative intention on the part of the owner shown that they shall be held or used in a manner which is inconsistent with their continuing to be demesne lands"? The mode by which such intention is evidenced will be different in each case.

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(1) 32 L. R. Ir. 72.

Richard Morgan, the lessee for lives renewable for ever, might have done what he liked with these lands, house, and demesne. He chose by his will to dedicate them for ever to charitable purposes, and that through the supreme authority of the Legislature was carried out by vesting the lands in a corporation, the members of which were high officials. The carrying out of the charitable trusts involved certain powers and duties, and also the limitations of these powers. The corporation under the trust imposed by Richard Morgan had the duty and power of making lettings of the lands, proper and beneficial for the management of the charity and keeping up its income. It was of course impossible, either in theory or practice, that Morgan or the corporation claiming through him, should ever occupy the mansion-house of Newcastle, or lands held with it, and therefore all idea of resumption is gone. In fact he dedicated both to perpetual management for the best advantage with a view to education. I do not think any hard and fast rule can be laid down as to the kind or duration of the lettings by which the management of the charity property would be carried on, and under proper sanction a total alienation would be possible. As regards description we have no document anterior to the death of Richard Morgan describing the lands except the head-lease, and the first description of them after the death is "commonly called," consistent with, I think, what had been once the demesne, and still retains the name.

The lease of 1857 threw in a considerable additional area. I think the covenants in the leases of 1857 and 1878 are consistent with both views, but that in the lease of 1878 debarring the tenant from claim under the Act of 1870 is an element in the case which cannot be left out of consideration. I do not regard it as more. *Prima facie* its presence is more appropriate in a lease of lands not in character excluded from the Land Acts.

It was competent for a person circumstanced as Richard Morgan was to undemesne the lands by acts or declarations, and inasmuch as he more than a century ago declared that the lands should be owned for ever by a corporation, who had no power to occupy, but only a power and duty to manage for ever to the best advantage for the charity, I think he has in effect declared that the lands shall be no longer demesne.

I am aware that the conclusion at which I have arrived differs from that of the Chief Baron and FitzGibbon, L. J., and therefore I have arrived at it with the hesitation and doubt which such dissent creates. The authorities on the subject up to the latest in this Court have been so recently reviewed by us in *Cheevers* v. *Fallon* (1), that no good purpose would be served by a re-discussion of them. I think this case should be decided upon its special facts. The *onus* is on the landlord. The description in the lease is, I think, equivalent to "what was in former times the demesne of Morgan." The throwing in of 60 acres, Gleeson's part, into the letting is an element. A further one is the letter of the 9th December, 1852, written by the agent:—"The house is not valued, but merely the land," that shows that the tenant was not intended to be charged for the house, excluding the idea of the mansion as any substantial subject of letting in the mind of the landlord.

I am of opinion that the order of the Land Commission is right.

PORTER, M.R.:—

I am of the same opinion, and not having heard, as a member of this Court, many of the cases which have been referred to, I have been obliged to go back to the essential question—What is demesne? Approaching that question as if it were a *res nova*, the word "demesne" in its ordinary or dictionary meaning is defined by Johnson as "land about a mansion-house occupied by the lord." A very good definition is given by Blount (the author of "Ancient Tenures"): he says—"Domains according to common speech are the lord's chief manor-place with the lands thereto belonging, *terræ dominicales*, which he and his ancestors have from time to time kept in their own *manual* occupation, for the maintenance of themselves and their families, and all parts of a manor except what is in the hands of freeholders are said to be domains." But he states that the word is not for that reason derived from *de manu* but from the French word *demaine* which signifies an Inheritance, and that comes from *dominium*. A precisely similar definition is given by Jacob.

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(1) [1895] 2 Ir. R. 407.

To the same purport is the definition in Stephen's Blackstone, vol. i., p. 224, note *u*, quoting from Lord Coke, to the effect that demesne includes *in strictness* lands held in villenage, though not popularly. He refers also to Bracton and Fleta. I take the passage from Fleta; Fleta (Lib. v. p. 289): "*Est autem dominicum proprie terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum, et terra precarie dimissa quae tempestive et pro voluntate domini poterit revocari, et sicut est de terra commissa tenenda quamdiu commissori placuerit.*" He puts it there that the primary and more proper meaning of demesne is land in the actual occupation of the lord, whereas Lord Coke says it would more accurately include land in the lord's occupation, apparently thinking that in its strictest sense demesne includes lands held of the lord in villenage, though the writer who calls himself Fleta thinks that the stricter use of the word limits its application to lands not so held. It is plain, however, that neither use of the word could be considered inaccurate. It would be impossible to find a word more frequently or copiously explained and defined through the whole range of our legal literature, and almost always in the same way.

It is I think to be regretted that when the Legislature has used a word of known legal import, such as the word demesne, it should not be construed in its legal, as distinguished from any merely popular, sense, modifying that legal sense so far, and so far only, as the enactment may necessarily require. We often complain that in this land code popular language is used without definition, leaving the Courts to speculate upon the intention of the Legislature as best they may, placing a legal meaning upon non-legal language. Here, however, is a word which has a legal sense; I admit that that legal sense cannot be *strictly* adopted in all its detail in reference to the word "demesne"; for, if it were, it would have no application in the Act of 1870 or that of 1881, since under those Acts tenancies from year to year outstanding against the lord are plainly not inconsistent with the existence of a demesne of the lord in the same lands. But in order to reconcile the legal meaning of the word "demesne" at common law with its statutory meaning, it would be only necessary to extend to a yearly tenancy the same principle which at the common law applied in the case of a holding at will or in villenage; and if this had been done no further change need have been made. Tenancies from year to year before the Act of 1870 were in practice the usual equivalents for the old tenancy at will. In Jacob's Law Dictionary it is said "copyhold lands have been accounted domains because they that are the tenants thereof are judged in law to have no other estate but at the will of the lord, so that it is still reputed to be in a manner in the lord's hands." I should not have thought that the Act of 1887 imposed any difficulty in the way of so dealing with the word. The argument that, as that statute applies to certain leaseholds the same rules as the previous Acts applied to yearly tenancies, therefore these leaseholds are not inconsistent with the existence of a demesne in the lord any more than yearly tenancies were, does not appear to me sound. The question of demesne lands arises in an exception out of the tenancies to which the Acts in terms apply, and to say that by carrying on the definition of the agricultural holdings, subject to certain exceptions, into the Act of 1887, the Legislature says that these exceptions would be *prima facie* within the latter Act, but for the imported exception—seems to be reasoning in a circle. I may take another instance:—A letting "to meet a temporary necessity" is excepted from the Act of 1881. Could it be held that a lease for 99 years under the Act of 1887 could and would, but for the exception, be within the scope of the latter enactment? However, it has been held, and it is too late to reopen it now, that a demesne may be set up by a lessee for a long term, and not necessarily by the owner in fee, chief tenant, lord, or by whatever other name the head landlord and lord of the soil may be named. *Magner* v. *Hawkes* (1) concludes this. But I do not understand *Magner* v. *Hawkes* (1) or any other case as deciding that a demesne within the Land Acts can exist except as an incident of the property of the landlord, whoever he may be, whose rent is sought to be affected by an order to fix a fair rent or the like, or that he can say—"I have no demesne, and never had, but the tenant has, and therefore that tenant cannot have a fair rent fixed." I am clearly of opinion that this cannot be done, and that the lands, if demesne, must for the purposes of the Acts be not the tenant's but the lord's demesne, notwithstanding the tenancy.

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(1) 32 L. R. Ir. 285.

It is on this ground mainly that I am of opinion that the lands in the present case are not demesne lands. When they were dedicated to charity and vested in trustees for charitable purposes, I think their use as a demesne, whether by the trustees or by the objects of the charity, became once and for all impossible. They were in fact and in law conclusively undemesned. Whether or not demesne involves any idea of personal enjoyment as contrasted with personal use, the possibility of the personal use or enjoyment of these lands by the landlord, in connexion with the dwelling-house, is out of the question where the lord is a body of trustees for charitable purposes. They must let them to be used and enjoyed by others, as they have done. The lands have never been the demesne of the trustees at all, and the trustees cannot claim the benefit of the exception.

Again I should have thought, but for decisions, that the existence of a lease outstanding against the landlord, which is inconsistent from its terms with any intention by the landlord to resume personal possession of the lands, so as to use them as a demesne in its legal sense, would have conclusively deprived the holding of the character of demesne. A yearly tenancy before the Act of 1881 was not so inconsistent. But *Spencer* v. *Tedcastle* (1) and other cases have decided that such a lease is not inconsistent with the retention by the lands of their character of demesne, notwithstanding the apparent opinion to the contrary of Sir E. Sullivan in *Griffin* v. *Taylor* (2).

We have thus framed not a definition but a sort of description of demesne for the purposes of this Act, which does not appear to me to correspond with either the legal or the popular sense of the word, but is inconsistent with either. There, however, I suppose it must remain. I do not feel disposed to go further in this

(1) 32 L. R. Ir. 411. (2) 16 L. R. Ir. 197.

direction, however; and I am of opinion that no decision obliges me to hold that the holding in this case is demesne land.

PALLES, C.B.:—

In my opinion, the order appealed from should be reversed, and the originating notice dismissed, upon the ground that the lands are "demesne."

All of us agree that they were "demesne" in the hands of Morgan, and the only question is, have they ceased to answer that description?

Three grounds only have been relied on during the argument as effecting this result, viz.—(1) the disposition of them by Morgan's will; (2) the words in the parcels, "the mansion-house, gardens, and demesne of Newcastle," being preceded by the words "*commonly* called"; and (3), Mr. Hamilton's letter of 9th December, 1852.

In reference to undemesning by the will, Mr. Justice Bewley puts his *ratio decidendi* in these words: "We have the most important fact, that the testator by his will gave these lands, with his other lands, to trustees for charitable purposes, and the effect of the Act of Parliament was to vest a moiety of the lands, and eventually (by means, as I take it, of a partition) the whole of these lands, in the trustees of Morgan's Charity Schools, to be managed by them for purely charitable purposes. It is idle, then, to suggest that these lands could, at any time, be resumed as demesne lands by the trustees of Morgan's Charity Schools."

This judgment was pronounced on the 20th May, 1893, which was prior to the publication of the report of *Magner* v. *Hawkes* (1). I believe that had the report of that case been before the Land Commission, their decision would have been different. But however that may be, the judgment of the Land Commission appears to me to rest upon the view that to make lands "demesne" there must be an intention in the landlord to resume the occupation thereof in connection with his own residence. In the judgments of the members of the Court which have been already delivered, the case has not been very clearly limited to that one consideration. No doubt the Lord Chancellor has said that all idea of resumption was gone; but I do not understand that that is the sole ground of his judgment, because he has stated more than once that he decides the case upon *all* its own special circumstances; a *ratio decidendi*, I may remark, which will render this decision one more in "the wilderness of single instances" which may be cited in the arguments of future cases upon the question of undemesning. The judgment of the Master of the Rolls, however, proceeds upon the disposition in Morgan's will; I shall first, therefore, in a few words, show how the latter question resolves itself into that of the more familiar one, whether an intention by the landlord to resume possession is involved in the definition of "demesne?" The trustees of Morgan's will could not occupy beneficially themselves; but there is nothing in that will to prevent them letting these lands; and if it is competent for an owner in fee-simple of demesne lands to let those lands to a tenant for years as demesne lands, with the intent that they shall be, and have the character of, demesne lands in the hands of the tenant, then the disposition of these lands by Morgan's will cannot *per se* undemesne the lands. I admit that if, as has been argued here, there is in the essence of "demesne lands" that their owner should be "a lord of the manor," or "a chief tenant of the crown," or a fee-simple owner, and that if, in order to constitute "demesne lands," there must be an intention on the part of that lord, chief tenant, or owner in fee-simple that he or his representatives shall at some time resume the occupation, and thenceforth hold the lands as demesne lands, then I admit the argument on the will would be conclusive; but the applicability of the argument upon the will turns upon the question, whether, when the owner of a "demesne" parts with it to a tenant, is it essential to the holding continuing to be "demesne," that there should be an intention in the landlord to resume its possession?

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(1) 32 L. R. Ir. 285.

In determining this, we are bound by the authorities upon the question already decided in this Court; but I may be permitted to say respectfully that I agree with very much, if not indeed with everything, that has been said by the Master of the Rolls in reference to the essential characteristics of "demesne," as it existed under the feudal law. It is not necessary to consider whether the origin of the word is *dominus* or *maison*. That is a matter upon which there has been some difference amongst text-writers; but we all agree that "demesne lands," according to the strict interpretation of them in feudal tenure, meant lands reserved by the lord for the purposes of his own personal enjoyment, in connection with his manor-house or chief place of residence, by not being granted out in freehold, and that lands continued to be "demesne" in the hands of the lord, although they were demised to tenants for chattel terms. Again we all agree that the feudal definition cannot be applied to "demesne" under this Land Act; and for this reason, that every tenant from year to year to the feudal lord of lands within a manor, would necessarily be excluded from the Act, as *ex hypothesi* his holding would be "demesne lands." To hold, therefore, that "demesne" in the Land Act was to be interpreted according to feudal definition, would be to exclude from the operation of the Act a large class of tenants whom it intended to benefit. That is the first argument that from a date even prior to this Act was held to render it impossible to apply this strict meaning to the word "demesne" in Acts in *pari materia*. It was so decided by Lord FitzGerald in *Hill* v. *Earl of Antrim* (1), upon the same word in the Land Act of 1870, overruling the decision of Mr. Otway, the Chairman of the County of Antrim; and after that decision had been pronounced, and whilst it was recognised as law, the Act of 1881 was passed, which repeated *verbatim* the exception in the Act of 1870, in which this word occurred. Its judicial interpretation must be taken to have been known to the Legislature, and the same expression in the new Act must be held to have been used in the sense so previously attributed to it. Therefore, in determining the meaning of "demesne land," we must, in the first instance, depart from the feudal definition. There was then a popular meaning of the words "demesne lands," viz. lands used in connexion with his dwelling-house by the owner of a house of the dignity of a mansion-house, by which I understand not a manor house, but a house of the dignity of the usual dwellings of persons in the rank of life of the persons who in former years were the owners of manors. Many years ago, and in more cases than one, it became a matter for consideration whether that definition ought to be adopted: *Griffin* v. *Taylor* (1), is the principal case in which the matter was discussed; and two definitions were there laid down, one by the late Lord Chancellor, Sir Edward Sullivan, and the other by my colleague, Lord Justice FitzGibbon, definitions which were not exactly identical, and which have since given rise to a great deal of controversy.

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(1) 5 Ir. L. T. R. 70.

It was admitted in that case, and pointed out by all the Judges, that the continuance of the lands in the occupation of the lord, or person whose position would entitle the land to be "demesne land," could not be an essential. Why? Because the Land Act deals only with "demesne lands" in the hands of a tenant. Therefore occupation by the lord, chief owner, or tenant *in capite*, could not be essential, because one of the *data* upon which we are to approach the question is, that not he but a tenant, and even a tenant from year to year, must be in occupation. The view Sir Edward Sullivan took was that the feudal definition was altogether inapplicable; and he says that "the true definition of demesne lands is, lands held by the owner with the mansion-house." He does not say what estate that "owner" must necessarily have; his definition is as consistent with the owner having an estate in fee-farm, or for a term of years, as with his having an estate in fee; and there the definition of Sir E. Sullivan rests. Well, my brother FitzGibbon was much more precise. He showed in the most accurate language what was his appreciation of the meaning of this word "demesne." He says—"It includes all lands, of whatever use or character, held by the *tenant-in-chief*, and occupied by him in connexion with his residence, the mansion-house of the estate." Here, it is to be observed, that although Lord Justice FitzGibbon excludes the element of manor, he still introduces one of the old characteristics of "demesne," derived from feudal tenure, and holds that it is essential to a "demesne," that the lands should be held by the tenant *in capite*, or immediate tenant to the Crown. But the Lord Justice had to deal with this, that that being his view of "demesne"

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(1) 16 L. R. Ir. 197.

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in the abstract, the Act of Parliament showed that the holding should be in the actual occupation, not of the tenant *in capite*, but of a tenant from year to year; and the question he considered was, how to apply this expression, of which he thought occupation by the tenant *in capite* to be of the essence, to that which was to be in the occupation of a person who was not, and could not be, a tenant *in capite*. Well, he solved that in this way; he said—If the lands had been demesne lands in the hands of the chief tenant, then, although that occupation had been parted with by him to a present tenant for years only, still, if it was parted with under such circumstances that the Court would come to the conclusion that there was an idea in his mind that at some future period he would resume the occupation of the lands as "demesne," they continued to be "demesne," within the meaning of the Act, notwithstanding that they were temporarily in the occupation of a tenant for years; and so the controversy was left in *Griffin* v. *Taylor* (1).

In *Magner* v. *Hawkes* (2), for the first time arose the question which of those two definitions was the correct one. Was it that of Sir Edward Sullivan, whose definition was large enough to allow the lands to become "demesne" whilst in the occupation, not only of a tenant in fee, but of a tenant in fee-farm, or termor; or was it of the essence that it should have been at one time the "demesne" of the tenant in chief? For, if the latter was right, any "demesne land" would be undemesned by a lease, unless the lessor had in his contemplation resumption and actual residence there at a future period. Well, that question was determined by a Court of five members in *Magner* v. *Hawkes* (2), and, Lord Justice FitzGibbon alone dissenting, it was held that the definition of Sir Edward Sullivan was to be followed, and that the word "owner" in his definition was to be read, not as limited to a tenant in chief, but as including a termor. That was the decision. Lord Justice Barry, in a later case, pointed out that that was the only point decided. That is perfectly correct. No member of the Court is bound by any portion of the reasoning by which any other member arrived at his conclusion; but it is a decision, binding upon this Court, as a Court, that lands can acquire the character of "demesne" whilst in the occupation of a termor. It is involved in that decision that a lease executed by a landlord who had not any idea of resuming the possession at a future time, did not necessarily undemesne the lands.

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(1) 16 L. R. Ir. 197.

(2) 32 L. R. Ir. 285.

The result I have mentioned not only logically follows from the *decision* in *Magner* v. *Hawkes* (1), but has been recognised by this Court in subsequent cases: for instance in *Spencer* v. *Tedcastle* (2) the Lord Chancellor says:—"It was argued by the respondent's counsel that the word 'demesne' as used by the Legislature, is not merely descriptive of the lands, but indicates something which the landlord has power to resume. The desire to preserve the right of resumption, where it existed, may have been the motive that influenced the Legislature to exclude 'demesne lands' from the Acts of 1881 and 1887; but though this may have been the motive of the Legislature in excluding 'demesne lands' from the operation of the Act of 1881, I can find *nothing* in any of the Land Acts *to show that it is essential* to constitute 'demesne,' that the landlord should have the power to resume possession. It is used to describe *the character* of the lands just as are used the words 'agricultural or pastoral.'" In the same case Lord Justice FitzGibbon says, "No doubt the intention and power of resuming possession form an important element in determining whether a holding is 'demesne land.' I myself, perhaps more than the other members of this Court, have often, as in *Griffin* v. *Taylor* (3), laid stress on the importance of this element; but *Magner* v. *Hawkes* (1) was a case in which it did not exist, and yet the majority of the Court after re-argument, I alone dissenting, held that lands which were not originally demesne, which were held by the owner in fee as agricultural lands, for a very long term of years, nevertheless were 'demesne lands' as between the termor and his occupying sub-tenant."

So again, in *Pratt* v. *Gormanstown* (4) Lord Justice Fitz Gibbon says—"However, in my opinion, the decision of the Court in

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(1) 32 L. R. Ir. 285.
(2) *Ibid.* 415.
(3) 16 L. R. Ir. 197.
(4) [1894] 2 Ir. R. 562.

Magner v. *Hawkes* (1) rules this case; not by the opinion of any one Judge, but by *the essential and cardinal principle of the decision itself which got rid of the idea of resumption by the owner in fee* as essential to 'demesne land.' If a termor can (as *Magner* v. *Hawkes* (1) decides that he can) convert a chattel holding into 'demesne land,' he must be capable of doing so while it is still in his own occupation. A subsequent letting may undemesne the holding, or may tend to show that it is not 'demesne land,' but I fail to see how the termor can keep it out of the Land Acts, and fix a fair rent for himself, when if let to a sub-tenant it would be 'demesne land,' and would be excluded as such from the Land Acts."

That being, as I take it, now settled law, the ground of the decision of the Land Commission has ceased to exist; and taking the law to be so, I ask why should the will of Morgan undemesne the lands? If lands in the character of "demesne" are more valuable than lands not in the character of "demesne," what is the difficulty in the trustees setting those lands upon the terms that they shall be used as a "demesne," and that notwithstanding the existence of the lease, they shall continue the "demesne" of the person to whom they are let? Take the case of an owner in fee of a "demesne," who sells and conveys the fee-simple of that "demesne" to another: surely in the hands of that other it may remain as his "demesne." If then instead of conveying it in fee, he leases it for 999 years, why should not the land that was "demesne" in the hands of the owner in fee be capable of being "demesne" in the hands of the tenant for 999 years? "Because it ceases to answer the definition of Lord Justice FitzGibbon in *Griffin* v. *Taylor* (2), of being occupied by the tenant in chief." If that were the correct definition, that would be a good answer; but the moment that that definition is disaffirmed by the Court, and that it is held that it is not essential to the character of "demesne" that it should be in the hands of the owner in fee, why should it not exist as "demesne land" in the occupation of a tenant for 999 years as well as in that of the tenant in fee? And if a lease for 999 years would not prevent its existing as the

(1) 32 L. R. Ir. 285.

(2) 16 L. R. Ir. 197.

"demesne" of that lessee, so neither would a lease for 99 years or 21 years. In every case, then, it would be a matter of construction upon the terms of the lease whether the effect of the lease was to undemesne.

Upon then this first point the decision in *Magner* v. *Hawkes* (1), that a termor or sub-lessee can create and constitute a "demesne"—involving, as it does, the elimination from the definition of demesne of the idea of resumption by the tenant *in capite*—shows that the effect of the will of Morgan was not to undemesne these lands. I can see nothing to prevent them remaining "demesne lands" in the hands of the tenant. There was no separation of the lands from the mansion-house; both are demised together.

As to the other parts of the case I have very little to add. The lands are described as "*commonly known* as the mansion-house or demesne," not as "the mansion-house and demesne"; but that has always been held as an element only in the consideration of the question; and it will be found, by going back to the earlier documents of title that the words "commonly called" were in these placed in a different position, and when so placed did not govern the word "demesne."

Lastly, there is the point arising on the letter of Mr. Hamilton of 9th December, 1852. That was the matter that gave me most difficulty in this case. My difficulty arose in this way:—I hold that it is essential, in order to constitute "demesne," that the lands shall not only be occupied with the mansion-house, but that, in the demise of the mansion-house and lands, the mansion-house shall be demised as such; that is, that the use that is contemplated of it shall not be a use different from that of a mansion-house. I may illustrate this by a case which I tried myself, and which is referred to in the judgment in *Magner* v. *Hawkes* (1). Upon Colonel Palliser's estate in Tipperary there was a demise of a large tract of land, originally part of the "demesne," I think about 800 acres. There was a very handsome mansion-house upon it, and the lease was made to a farmer. It was proved that the rent was calculated at an acreable rate, and

(1) 32 L. R. Ir. 285.

from the amount brought out by the acreable calculation there was a deduction of the acreage of such portions of the land as were covered by, or were under the influence of, the ornamental demesne trees, and that the rent having been calculated on the reduced acreage, instead of any sum being added for the house, there was an allowance of, I think, £50 a-year, to enable the tenant to keep up fires and keep the house dry. In other words, it was plain that what was intended to be demised was a farm, exclusive of the portions of the land merely ornamental and of no value in husbandry, that the mansion-house was not intended to be occupied by the tenant as such, and that he got it merely because he could not get the land which he required without taking with it the house which was upon it, but which, instead of being useful, was a burthen to him. Now, if I found in this case, as I did in that case, that no rent was charged for the mansion-house, and that the calculation of the rent was merely for so much of the land as was strictly agricultural, excluding everything which was ornamental merely, I should have joined in affirming the decision appealed from; and the doubt I had was whether Mr. Hamilton's letter of 9th December, 1852, did not evidence that state of facts. I have since the hearing considered that letter carefully, with a view of determining whether, from it, I could arrive at the conclusion that the house was not leased as a mansion-house. The letter, however, is susceptible of another construction which is, I think, the true one, although the evidence upon the subject is not very clear. Large sums appear to have been spent by the tenant upon the repair or improvement of the mansion-house, and by reason of this expenditure he appears to have sought a reduction in his rent. The letter in question is a reply to that application for reduction. Read in that sense it does not say, "the house is useless to you as a residence, and therefore I will not charge you rent for it, as such," but, "we do not derive any benefit from your expenditure upon the house, inasmuch as we are willing that you shall have a lease of it and the lands at the present rent."

Upon these grounds, I am of opinion that the decision about to be pronounced by the majority of this Court is inconsistent with the decision in *Magner* v. *Hawkes* (1), and that the order of the Land Commission Court ought to be reversed.

FITZ GIBBON, L.J.:—

I concur with the Lord Chief Baron. Until *Magner* v. *Hawkes* (1), I clung to the idea which I had put forward in *Griffin* v. *Taylor* (2), that the Land Acts contemplated the possibility of occupation by the landlord, in connection with his residence, as the criterion of "demesne land," but, having stood alone in my opinion in *Magner* v. *Hawkes* (1), I loyally accepted the decision of the Court, and the subsequent cases, such as *Spencer* v. *Tedcastle* (3) and *Pratt* v. *Gormanston* (4), showed that the possibility of resumption was not necessary, but that, as the Lord Chancellor put it, the word "demesne" was "used to describe the character of the lands."

I cannot reconcile this decision with those to which I have referred.

It is necessary to mention some matters of title, which dispose of a great deal of the respondent's argument. The root of title is the lease of 1723, from Hugh Henry to John Neville, of 255 Irish acres, for three lives with a covenant for perpetual renewal.

That lease has never been renewed, but the renewable interest created by it constitutes the estate of Morgan and his successors in title. No document of title to that estate mentions demesne land at all. As between the owner in fee and the equitable lessee for lives renewable for ever, the subject of demise was a large tract of ordinary land, let to a tenant to make what he could of it. Between 1723 and 1784, Richard Morgan erected on that portion of the estate which is now in dispute, a residence worthy of the name of a mansion-house, he annexed 100 acres of land to it, laid out and planted the land, made a garden, built out-offices, and made the place a mansion-house and demesne, in which he lived and died. He was possessed, as the Act settling his property shows, of large landed estates in different counties, and Newcastle was in every sense his mansion-house and his demesne. It is now said that his will undemesned it. The facts contradict this. The place was never called a demesne by Richard Morgan, it was first called a demesne by his heir, who went into possession on his death. John Godley, Morgan's heir-at-law, demised Newcastle by lease of June 22, 1786, to "Alexander Graydon of Mecklenburgh Street, Dublin, Esquire," no agricultural or pastoral tenant, but a gentleman living in what was then a good part of Dublin. This lease, executed by the heir claiming against Morgan's will, demised the holding as it stands now, with the exception of what has been recently added, by this description—"That part of the lands of Newcastle in the possession of Alexander Graydon, commonly called the mansion, garden, and demesne, of Newcastle, together with that part of the demesne called the house range." That was no ordinary agricultural or pastoral holding. Litigation ensued, and a compromise and partition were carried out by an Act of Parliament. I ask this question—What would this holding be now, if, in the partition, it had fallen to John Godley instead of to the trustees? It would be absolutely impossible to deny that it had the character of "demesne," as interpreted by case after case, if John Godley were now the landlord. Therefore I say that this case is decided against the trustees solely because of the character which they have as landlords. The character of the landlord is a circumstance to be considered, but in the present case it is made decisive, and it is held, for the first time, and in my opinion wrongly, that this corporation cannot have "demesne land." From the date of the Act of Parliament until 1857, the Graydons continued to hold under the trustees. On July 1, 1857, the present tenant, Alexander Erasmus Graydon, took a lease for twenty-one years, in which the lands were described as "that part of the lands of Newcastle late in the possession of Alexander Graydon, senior, and now in the possession of Alexander Erasmus Graydon, commonly called the mansion, garden, and demesne of Newcastle." The original lease of 1786 shows that the words "commonly called" were not intended to throw any doubt upon the description. The same tenant took a second lease in 1878, which increased the parcels to some extent, but confirmed the provision that there should be only one dwelling-house on the holding, and repeated the description of the mansion-house and demesne. Against these documents of title, what effect can be given to the letters of 1849 and 1852? The dates are important. No lease was in existence when these letters were written. They are only two pieces of a correspondence of which the rest is not produced, but which resulted in the lease of 1857, which recognised the character of the holding as a mansion and demesne. The letters show nothing inconsistent with this character, and they can have no effect to control the lease, which was subsequently made in 1857, and renewed in 1878. These descriptions were adopted before the Land Acts, and again and again the lands were described as demesne, and never as anything else, during a period of over 100 years, when no one was under any temptation to describe them otherwise than as they were. In determining the character of the holding, the contract of the parties is the first element to be considered, and though the agricultural land might have been undemesned if it had been let away separately, this case stands above all others in the reality of the thing, because we are dealing with the actual mansion-house in which the owner of a large estate lived and died, which is still surrounded by its own grounds, has never been separated from them, and is, in its physical character, the same demesne and mansion-house to-day which John Godley let as such in 1786.

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(1) 32 L. R. Ir. 285.
(2) 16 L. R. Ir. 197.
(3) 32 L. R. Ir. 411.
(4) [1894] 2 Ir. R. 562.

What then are the objections to its being "demesne land" under the Land Act? First that the landlords are a corporation. I can see no disability in a corporation to hold "demesne land" as a class of property, unless the idea of personal occupation by the landlord is to come in, and the decisions of this Court, and especially of the Lord Chancellor, have disposed of that point. The corporation are fighting for the increased value which this class of property bears, both in rent and in saleable value, and we cannot deprive them of this, any more than we can deprive them of pasture lands, or of "mill-holdings," or of any other holdings to which the Land Acts do not apply. But there is another answer. The corporation has the power of alienation. Both under statute, and under the Scheme which defines their powers, these trustees can sell their land. What would the holding have been, if it had been sold by the corporation before the Land Acts? What would it be if they had sold it before the originating notice? John Godley took possession of it as a mansion-house and demesne. Could it be anything else in the hands of a purchaser from the trustees? It comes back to this, that the mere fact of their being a charitable corporation deprives them, in the judgment of this Court, of the right to hold a valuable property. I cannot concur in that judgment.

An interesting point was raised by the Master of the Rolls, when he defined demesne as "*terrae dominicales.*" With all respect, he forgets that "demesne" has at least two different meanings, and that one of them probably has nothing to do with *domain* or *terrae dominicales.* If "demesne" meant *terrae dominicales* in the Land Act, the definition would exclude all tenantable lands not in the hands of freeholders. But the secondary and more popular meaning is thus given in the Imperial Dictionary.—" 1. A manor-house and the land adjacent or near, which a lord keeps in his own hands or immediate occupation, for the use of his family, as distinguished from his tenemental lands distributed among his tenants. " 2. Demesne lands, lands which the lord has not let out in tenancy, but has reserved for his own use and occupation." "Demesne," in this sense, etymologically may be unconnected with *dominus* or *dominicalis.* Tomline, quoting from Bracton, says—"This word is oftentimes used for a distinction between those lands that the lord of the manor hath in his own hands or in the hands of his lessee demised at a rack rent, and such other land appertaining to the manor which belongeth to free or copyholders." He adds "as *demains* are lands in the lord's hands manually occupied, some have thought this word derived from *de manu*, but it is from the French *demaine* which is used for an inheritance, and that comes from *dominium.*" But Kelham derives it from *demesne*, "own." However that may be, the word in the Land Acts does not denote *terrae dominicales*, but describes land connected with a mansion-house, of a character suited for the personal use and enjoyment of a person above the position of an agricultural or pastoral tenant; in fact, it means land precisely of the character of Newcastle House and demesne.

The only matter which remains is to refer to the cases on this question. I mentioned them recently in *Cheevers* v. *Fallon* (1), and until then there was no case in which land described in any of the documents of title as demesne was held within the Land Acts. In *Orpen* v. *Fitzgerald* (2), decided in 1884, the land was let in 1853 *eo nomine*, as demesne, and Sir Edward Sullivan said :—"The lease of 1853 described the lands as demesne; the lands were let as demesne to keep them as such." In *Lalor* v. *Castletown* (1), decided in 1888, I dissented from the other members of the Court. Lord Ashbourne said :—"The lands were demesne down to the making of the lease by Lord Castletown, and the lease did not destroy their previous character." In *Smith* v. *Hotham* (2), decided in 1888, "Duleek Park" was let by lease in 1853 at a rent of £750; and it was held that the lands were demesne, as there was no evidence of any change of their character. In *White* v. *Johnston* (3), decided in 1892, the Chief Justice said :—"The lands were demesne until the time of the lease, and the lease showed that the lessor intended that the lands should continue in their original character."

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(1) [1895] 2 Ir. R. 407.

(2) Unreported.

In *Burgess* v. *M'Craith* (4) the lands were let as demesne, and were so described in the documents; and as the subject matter of the letting corresponded with the description, it was held that the land was demesne. In *Roche* v. *Rice* (5) the lands were described, in a lease of 1849, as "the dwelling-house and demesne of Straw Hall." Lord Ashbourne said—"the case was hardly arguable." I said that the description of "demesne land," occuring before the Land Act, was almost conclusive.

In *Magner* v. *Hawkes* (6) the Chief Justice said :—"In my opinion the tenure is an element to be taken into consideration in determining whether the lands are demesne lands, and no more. In the determination of that question, all the circumstances of the particular case are to be taken into consideration—the tenure, the social position of the owner, the user past, present, and contemplated, but above all the physical characteristics of the subject matter." The Chief Baron said at p. 307 :—"A holding may be 'demesne lands' within the Land Law Act, although its most appropriate use is agricultural or pastoral, and although its use as such was its principal and primary use in the contract of the parties to the letting, provided the use *by the tenant of the mansion-house as such* was also contemplated." It was not only contemplated here, but has been carried out for 108 years, and there is a covenant that no other house but the mansion-house shall be built on the lands. Barry, L. J., expressed his opinion :—" from the physical character of the place, and its mode of user, that these were demesne lands, and there has been nothing to undemesne them."

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(1) Unreported.
(2) Unreported.
(3) Unreported.
(4) 26 Ir. L. T. R. 113.
(5) *Ibid.* 117.
(6) 32 L. R. Ir. 285.

In *Spencer* v. *Tedcastle* (1) the Lord Chancellor said, at p. 415 :—" I can find nothing in any of the Land Acts to show that it is essential to constitute 'demesne' that the landlord should have the power to resume possession."

This case resolves itself into this. A holding which physically consists of a good mansion-house, and a handsome demesne, having had that character for over 100 years, has during all that time been the residence of gentlemen holding the position which we should expect the occupiers of such a place to fill. No one could doubt that this was demesne land, but that the landlords are trustees for a charity. The original demise was made not by them, but by the founder's heir-at-law claiming adversely to them. His tenant attorned to the Corporation. Every demise since has treated the lands in the same way, and has described them as possessing the same character, and I doubt that we have ever had a case before us of which my brother Barry could more truly say—as he is fond of doing—" This is not the class of case to which the Land Act was ever intended to apply."

BARRY, L.J. :—

I rather think that it was Dr. Johnson who said at one period of his life that he hoped he would never hear again of the Jugurthan war. I should be very glad if I never heard discussed again in open Court what is the origin of the word "demesne." We have had it very often. In this case I have had the advantage of reading the judgment of the Lord Chancellor which he has delivered, and, as I concur in it, that dispenses with the necessity of my adding anything but a bush to the wilderness of cases on " demesne " referred to by the Lord Chief Baron. I contributed a little to this arboriferous confusion by my judgment in *Pratt* v. *Gormanstown* (1), where we had *Magner* v. *Hawkes* (2) discussed up and down, and fortunately for me I very fully discussed *Magner* v. *Hawkes* (2), and explained what I thought was an erroneous impression in the mind of Bewley, J., as to the nature, scope, and effect of the decision of this Court in *Magner* v. *Hawkes* (2). I am very glad that the Chief Baron concurs in my view of what was decided by the Court in that case. Having discussed all about that in *Pratt* v. *Gormanstown* (1), I am relieved from the necessity of going over it again. It will be all found in the August number of the Irish Reports. As to the question raised in that case, I said in *Pratt* v. *Gormanstown* (1 , "that in *Magner* v. *Hawkes* (2) the Court decided, and decided only, the question of law raised in the case, namely, that the existence of a fee simple estate in the landlord, or the predecessors in title of the landlord against whom the fixing of a fair rent was claimed by his tenant, was not necessary to constitute the holding 'demesne' within the meaning of the Act." Further on I stated—"So far as I am personally concerned, I am not, as at present advised, prepared to assent to the opinion of the Lord Chief Baron; the strong inclination of my opinion at present is that a holding to be 'demesne' land, within the exception in the Act, must be (or have been) 'demesne' of the landlord against whom the fair rent is sought to be fixed, or his predecessors in title." I stated that as my impression in *Pratt* v. *Gormanstown* (3), I now give it as my opinion. Then comes the question whether these lands, which undoubtedly were "demesne" at one time, and which, if they had been allotted to John Godley, would have been demesne lands in his hands, are demesne lands now? I am not sure that if they were held in fee now, Graydon would not have them as demesne lands, but that is not the question, but whether the course of dealing with the lands—not this incident or that taken *per se*—not the will of Richard Morgan who gave them to a charity—but whether the whole course of dealing was absolutely inconsistent with any idea of demesne lands. I hold that they must be demesne lands of the landlord. The notion that this is the demesne land of such persons as the Lord Primate of

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(1) 32 L. R. Ir. 411.

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(1) [1894] 2 Ir. R. 562. (2) 32 L. R. Ir. 285.
(3) [1894] 2 Ir. R. 571.

Appeal. 1895.

GRAYDON *v.* TRUSTEES MORGAN'S CHARITY.

Barry, L.J.

Ireland, the Archbishop of Dublin, the Lord Chief Justice, the Chief Justice of the Common Pleas, and the Lord Chief Baron, is little short of an absurdity. But it has been laid down again and again that you can undemesne, and it is absurd to hold it was demesne in the hands of those gentlemen after the course of dealing with it for over 100 years.

There is one other thing. Fitz Gibbon, L.J., said we were holding that no Corporation could hold demesne land. I am not deciding that proposition. Corporations hold lands very extensively, such as the Corporation of Dublin, and if they have demesne land they may let them on their own terms, as demesne. Here we are dealing with the special facts in this case, extending over a long period of time.

Solicitors for the landlord: *Thomas Tighe Mecredy & Son.*
Solicitor for the tenant: *Wills C. Bennett.*

R D. M.

CHARLTON *v.* MORRIS (1).

Appeal.
1894.
Nov. 7.

Parliament—Registration of voters—Inhabitant occupier—Compulsory absence during part of qualifying period—Imprisonment on remand without bail—No trial before Revision Sessions.

Patrick Morris was arrested, and remanded without bail to Petty Sessions. At Petty Sessions he was returned for trial (bail being accepted) to Quarter Sessions. His trial had not taken place at the time the Revision Sessions were held:—

Held (Fitz Gibbon, L.J., dissenting), that his innocence was to be presumed until his guilt was proved, and that he was not to be deprived of the franchise by his compulsory absence until his guilt was proved.

Appeal by the objector against the decision of Mr. D. B. Sullivan, Q. C., one of the Revising Barristers for North Fermanagh.

The facts appear from the case stated which was as follows:—

"The name of Patrick Morris appeared at No. 36 on the Clerk of the Union's Supplemental List of Inhabitant Occupiers (No. 12) as the inhabitant occupier of a house at Forthill, and he was objected to on the grounds that he had not inhabited said house during the whole of the qualifying period.

"The right of the said Patrick Morris to be registered was admitted by the objector save for the following question of law:—

"The said Patrick Morris was, during the qualifying period, arrested by the police on a criminal charge, and on the day of his arrest was brought before a magistrate, who remanded him upon warrant to gaol for a week without bail. During this week Morris was confined in Sligo gaol, and on its expiration he was brought up at Petty Sessions, and the charge having been investigated, informations were taken, and he was returned for trial at the Quarter Sessions, and allowed out on bail pending trial, which has not yet taken place.

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(1) Before Sir Peter O'Brien, C.J., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

Appeal.
1894.
CHARLTON
v.
MORRIS.

"Under these circumstances, it was contended on behalf of the objector that the said Patrick Morris was disqualified by reason of his having been compulsorily absent from his said house during the week above-mentioned.

"On behalf of the said Patrick Morris it was contended that as his trial had not yet taken place I was bound to assume him innocent of the charge, and that therefore his confinement in gaol was his misfortune and not his fault.

"I yielded to this latter contention, and following (as I thought) the case of *Connolly* v. *Riddall* (1), placed Morris' name upon the Register. If I was wrong in so doing his name should be expunged.

"Notice of appeal was given, etc."

Ross, *Q.C.*, and *Dane*, for the appellant.

Healy, for the respondent.

SIR PETER O'BRIEN, C.J.:—

I think this case is governed by the principle of *Connolly* v. *Riddall* (1). It was there decided that though a man was imprisoned during the qualifying period, if, on his trial he was acquitted of the charge on which he was arrested, he was not disqualified by the imprisonment. This man has been in gaol during the qualifying period, but has not yet been brought to trial. However, inasmuch as he has not been convicted we are *pendente lite* bound to presume him innocent, and to treat his imprisonment as "his misfortune and not his fault." The man is therefore entitled to the franchise, and the decision of the Revising Barrister must be affirmed.

PALLES, C.B.:—

It is admitted that if this claimant had been acquitted he would be entitled to be registered. It was so decided in *Connolly* v. *Riddall* (1), and notwithstanding the cogency of the reasoning of Fitz Gibbon, L.J., this Court, as at present constituted, is bound by that decision. The ground of it was that put by Byles, J., in *Powell* v. *Guest* (1), that the man was innocent, and that his compulsory absence from his home was his misfortune, not his fault.

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(1) 24 L. R. Ir. 127.

The innocence of Morris had not been irrebuttably proved by his acquittal before the Revision Sessions; but I think that the Revising Barrister was bound to presume that he is innocent until he was found guilty. He is therefore entitled to be registered.

FITZ GIBBON, L.J. :—

I am bound by the decisions that have been cited, though I may fairly say that it is "my misfortune and not my fault," if they are not satisfactory. The words of the Act of Parliament—"himself occupy"—have been held to require more than constructive occupation, though it might have been wiser to have framed or interpreted the law otherwise. Morris has not personally occupied the qualifying premises "during *the whole* of the twelve preceding calendar months." Yet, on the authority of *Connolly* v. *Riddall* (2), he is to be put upon the Register. In doing this, we extend the principle that a prisoner, who "committed no crime and ought not to have been arrested," is to be held to have uninterruptedly occupied his own house, to a case where the question has not yet been decided whether the man has committed a crime or not. I am as far as ever from being satisfied of the soundness of this principle, and I cannot agree to extend it.

BARRY, L.J., concurred with SIR P. O'BRIEN, C.J., and PALLES, C.B.

Solicitor for the appellant: *Falls.*
Solicitor for the respondent: *Murphy.*

G. Y. D.

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(1) 16 C. B. (N. S.) 81. (2) 24 L. R. Ir. 127.

KENNY *v.* KENEALY (1).

Appeal.
1894.
Nov. 8, 9, 12.

*Parliament—Registration of voters—Notice of objection—Omission of polling district—Date of signing notice—*Onus *of proof—Evidence.*

In a borough which had been divided into polling districts a notice of objection served on a voter omitted to state the particular polling district to which the voter objected to belonged:—

Held (affirming the decision of the Revising Barrister), that the notice of objection was bad.

The objector could not swear that he signed several notices of objection on the days they purported to bear date, but the notices were duly signed by him before they were served, and they were duly served within the limits of time for giving such notice:—

Held (reversing the decision of the Revising Barrister), that the general *prima facie* presumption that all documents are made on the day they bear date applies to notices of objection.

Appeal by the objector from the decision of Mr. Moloney, Revising Barrister for the borough of Kilkenny, holding certain notices of objection bad, and refusing to amend the same.

The facts appear from the case stated, which was as follows:—

1. "The names of John Burke and other persons named in the first and second schedules to this case, appeared on the town clerk's Lists of Voters (No. 17) for the borough of Kilkenny.

2. "By a resolution of the Corporation of Kilkenny, passed on the 1st day of June, 1885, pursuant to the 48 Vict., c. 17, sect. 9, sub.-sect. 3, the said borough had been divided into two polling districts, known as the 'Court House Polling District' and the 'Tholsel Polling District,' respectively. The resolution was in the following terms:—Ordered and agreed upon 'That all within the Municipal boundary be formed into one polling district, and all outside that boundary, and within the Parliamentary boundary, be formed into another polling district, and that the polling places for voters, within the borough boundary, be at the Courthouse, and the polling place for voters, between the

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(1) Before Sir Peter O'Brien, C.J., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

borough and the Parliamentary boundary, at the Tholsel.' It was also agreed that the List of Voters be made out alphabetically.

3. "The said John Burke, and each of the other persons named in the first and second schedules had been duly served with a notice of objection, which complied in all respects with the form prescribed by the 3rd schedule to the 48 Vict., c. 17, except that it wholly omitted to state the particular polling district to which the voter belonged. I append the notice of objection served in the case of the said John Burke (1).

4. "It was contended, on behalf of Richard Kenny, the objector, the omission did not invalidate the notice of objection.

5. "I decided that the notice of objection in each case ought to have specified the particular polling district to which the voter belonged, and that, by reason of the omission, the notice of objection to each of the persons named in the first and second schedules was invalid.

(1) The notice was in the following form:—

THIRD SCHEDULE.

Section 20.

NOTICE OF OBJECTION to be given to Parties, not being persons named in any List of Claimants, objected to by any person other than the Clerk of the Peace, or Clerk of the Union, or Poor-rate Collector.

Polling District of

To Mr. *John Burke*,
of *Walkinslough, Walkin-street, Upper.*

Take Notice, that I object to your name being retained on the List (No. 17) for this Polling District of Voters for the Borough of *Kilkenny*, and I ground my objection on the column of the Register headed "Nature of Qualification," and also on the grounds:—

1. That during the qualifying period you were not
   (*a*) Tenant or Owner of the qualifying premises.
   (*b*) Sole Tenant or Sole Owner of the qualifying premises.
   (*c*) The inhabitant of the qualifying premises.

Dated the 17*th* day of August, One Thousand Eight Hundred and Ninety-*four*.

Signed, *Richard Kenny*,
of *Newpark, Lower Greens-hill, Kilkenny*,
being now on the List of Voters (No. 17) for the
Borough of *Kilkenny*.

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6. "I was then asked, on the part of the objector, to amend the notice of objection in each case by inserting the proper polling district. I refused to make such amendment, being of opinion that the total omission of an essential element of the prescribed form was not a 'mistake' within the meaning of sect. 27, sub-sect. 2, of the Registration (Ireland) Act, 1885.

7. "The notices of objection to John Burke and each of the other persons named in the first schedule were signed by Richard Kenny before they were served, and were duly served upon the persons objected to, within the limits of time allowed for giving notice. The said Richard Kenny, on being examined before me, could not, however, say that he signed the notices of objection upon the days they purport to bear date. He deposed that he used to go to the Home Rule Club, in the City of Kilkenny, each evening, and remain in one room in the club while the notices were being filled up in another. The notices were brought to him in bundles of 9 or 10 at a time, and he signed them at once, and never brought any of them to his own home. I offered to receive evidence from the persons who filled the notices that they inserted the correct date therein and on the same day brought them to Richard Kenny for signature; but no such evidence was tendered.

8. "It was contended, on behalf of John Burke, that the notice of objection must be signed upon the day it purports to bear date, and *Parkinson* v. *Brophy* (1) was relied on. It was contended on behalf of Richard Kenny, the objector, that a notice of objection need not be dated the same day as that on which it is signed, and that it is sufficient if it is dated some day within the limits allowed for giving notice; *Jones* v. *Jones* (2) was referred to.

9. "I was of opinion that a notice of objection must be signed upon the day it purports to bear date, and as it was not proved that the notices of objection to the persons named in the first schedule were so signed, I held the notices of objection to all the persons named in the said schedule, to be bad on this further ground.

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(1) 15 Ir. C. L. R. 346. (2) L. R. 1 C. P. 140.

10. "As it was intimated to me that the objectors would appeal from my decision, I took the evidence *de bene esse* in each case. It was proved to my satisfaction that none of the persons named in the first and second schedules were entitled to be on the register of voters, and if they had been duly objected to I would have expunged their names therefrom.

11. "If I was wrong in holding the notices of objection invalid by reason of the polling district having been omitted, and by reason also of the notices of objection not being proved to have been signed on the days they respectively purported to bear date, the names of the persons in the first schedule are to be expunged from the register; if I was right on both points, or on either of them, the names are to be retained.

12. "If I was wrong in holding the notices of objection invalid, by reason of the polling district having been omitted, the names of the persons in the second schedule are to be expunged from the Register; if I was right their names are to be retained.

13. "Notices of appeal having been given in all the cases, I declare that all the said appeals ought to be consolidated, and the said Richard Kenny, so consenting, I name him to be the appellant in such consolidated appeal.

14. "I name Cornelius J. Kenealy as and being town clerk of the borough of Kilkenny, and also the said John Burke, on behalf of himself and the other persons named in the first and second schedules, and, at the request of his solicitor, to be respondents in this appeal."

Healy, for the appellant:—

The division of the borough into polling districts has not been legally carried out; the resolution of the town council does not give names to the two districts; it does not appear that that resolution has ever been published in the *Gazette*, or confirmed by the Lord Lieutenant: 48 Vict. c. 17, s. 9, sub-sect. 3; 35 & 36 Vict. c. 33, s. 18; 36 & 37 Vict. c. 2.

The Revising Barrister had power to amend and should have amended the notice of objection: *James* v. *Howarth* (1); *Adams* v.

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(1) 5 C. P. Div. 225.

Appeal.
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Bostock (1); *Bollen* v. *Southall* (2). *Pierce* v. *Beveridge* (3), is distinguishable, because there the objection called the polling district by a wrong and misleading name.

There can be only one list of voters in a borough: 13 & 14 Vict. c. 69, s. 6.; 48 Vict. c. 17, s. 13, and Schedule I., Forms xiii. and xvii.

Provided the notice of objection was signed within the proper period it need not have been signed on the day it bears date: *Jones* v. *Jones* (4) will be followed by this Court in preference to *Parkinson* v. *Brophy* (5).

Clancy for the respondents:—

It lies on the objector to prove the date and signature of his notice of objection: 13 & 14 Vict. c. 69, s. 36, Form No. xxiv.: *Parkinson* v. *Brophy* (5) is rightly decided. In *Irvine* v. *Gregg* (6), the Court of Exchequer Chamber followed *Parkinson* v. *Brophy* (5) in preference to *Jones* v. *Jones* (4).

The sections referred to requiring publication of the resolution of the town council in the *Gazette* and confirmation of the resolution by the Lord Lieutenant apply to counties only. No specific name need be conferred upon the polling districts by the resolution. The town council need only publish a description of the polling districts in such manner as they think fit: 48 Vict. c. 17, s. 9 sub-sect. 3. This resolution has been so published; it contains a compendious form of description of the two polling districts.

The objection is made to the name on a list; where there is more than one list, the list on which the name is, to which objection is made, must be specified: see note to foot of statutory form of objection. Here there were in fact two lists; there ought to be two lists, for "the register of voters shall be made up in separate lists for each polling district:" 48 Vict. c. 17, s. 9, sub-sect. 3.

This is not a mistake which the Revising Barrister had power to amend: *Pierce* v. *Beveridge* (3); *Hartley* v. *Halse* (7); *Burnett* v. *Britain* (8). What was omitted here was an "essential element."

(1) 8 Q. B. Div. 259.
(2) 15 Q. B. Div. 461.
(3) Lawson, Notes, 276.
(4) L. R. 1 C. P. 140.
(5) 15 Ir. C. L. R. 346.
(6) 11 Ir. Jur. (N. S.) 386.
(7) 22 Q. B. Div. 200.
(8) Lawson, Notes, 275.

James v. *Howarth* (1); *Adams* v. *Bostock* (2); and *Bollen* v. *Southall* (3), are distinguishable, because in each of them the notice identified the particular list in question.

THE COURT directed the lists to be produced for inspection.

Cur. adv. vult.

SIR PETER O'BRIEN, C.J.:— Nov. 12.

The judgment of the Court will be delivered by the Lord Chief Baron.

PALLES, C.B.:—

Two of the questions argued are not open upon the reservation, viz., whether the Revising Barrister, 1. had power to amend, and 2. ought to have amended.

As to the validity of the notice of objection as framed and without amendment, it is now settled by authority that the notice is bad where there are more lists than one, each of which answers the description in the notice. Here there were, in fact, two separate lists, in the form, No. 17, viz., the lists purporting to be those of the so-called Court-House and Tholsel, polling districts respectively.

The argument is that these two lists, separate in fact, form in law but one single list, as it has not been proved that the local authority gave a direction under section 13 that there should be separate lists for each polling district.

I do not think it necessary to decide how this might have been had it been proved and found by the Revising Barrister that no such directions had been given, but as two separate lists were prepared by the town clerk, and were before the Barrister for revision, I think the maxim, *omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium*, applies, and that in the absence of evidence to the contrary, the Revising Barrister, even had the objections been specifically made, would have been bound to presume that the state of facts existed under which there was authority to prepare two separate lists. This is the more clear in the present case, in which the objection does not appear to have been specifically

(1) 5 C. P. Div. 225. (2) 8 Q. B. Div. 259. (3) 15 Q. B. Div. 461.

taken. Upon that question, therefore, I think the Revising Barrister was right, and that for this reason, the notices of objection must be held to be bad.

Upon the remaining question I am of opinion that the Revising Barrister was wrong in holding the notice invalid by reason of it not having been proved that it was signed on the day it bears date.

I see no reason why the general *prima facie* presumption that all documents were made on the day they bear date, should not apply to a notice of objection. In *Parkinson* v. *Brophy* (1), the case relied upon by the Revising Barrister, it was affirmatively proved, and found as a fact, that the notice was *not signed* on the day of its date.

Solicitor for the appellant: *Buggy.*
Solicitor for the respondent: *M'Carroll.*

G. Y. D.

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(1) 15 Ir. C. L. R. 346.

HOLLAND *v.* HAGAN (1).

Appeal.
1894.
Nov. 12.

*Parliament—Registration of voters—Inhabitant occupier—Compulsory absence during part of qualifying period—Imprisonment during portion of a day after conviction—Legal day—*De minimis non curat lex.

A voter was arrested and imprisoned, and on being brought before the magistrate next day was sentenced to imprisonment for fourteen days, with the option of a fine. He paid the fine, and was discharged. The period of his detention did not extend over the entire of any one day:—

Held, that as the law will not take notice of fractions of a day the voter was not to be deprived of the franchise by reason of his compulsory absence for portions only of two successive days.

Appeal by the objector against the decision of Mr. Wylie, Q.C., one of the Revising Barristers for the borough of Londonderry. The facts appear from the case stated, which was as follows:—

"James Hagan appeared on the list of voters for the North Division of the borough of Londonderry as an inhabitant occupier of a house and yard, 2, Donegall-street, in said borough, and was duly objected to.

"The said James Hagan proved his right to have his name retained on said list of voters in respect of the qualification therein stated, unless disqualified by the following circumstances:—The said James Hagan was arrested by the police for drunkenness at 7 o'clock, p.m., on Friday, and detained in the police cell during Friday night. He was brought before a magistrate on said charge on Saturday morning following, and was fined 12*s.* 6*d.*, with the alternative of imprisonment, in default of payment, for fourteen days. He paid the fine, and was discharged at 6 p.m. on same day.

"It was contended by the objector that the inhabitancy of the said James Hagan was broken during the qualifying period by detention as aforesaid in the police barrack all night, and during portion of the next day after conviction.

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(1) Before Sir Peter O'Brien, C.J., Palles, C.B., and FitzGibbon and Barry, L.JJ.

"I was of opinion that the case was not distinguishable from *Sally* v. *Burnett* (1), and retained the name. If I was wrong the name of the said James Hagan (No. 666 on the said list) should be expunged from the said list."

Ross, Q.C., for the appellant.

Healy, for the respondent.

SIR PETER O'BRIEN, C. J. :—

We are all of opinion that the decision of the Revising Barrister is right; and we are all also of opinion that if the respondent had been detained for an entire day he would have been disqualified according to the decision of Morris, C. J., in *Martin* v. *Hanrahan* (2). But Hagan was not in prison for one entire day; he was detained for portion of Friday and for portion of Saturday; this involves that he was in occupation of the qualifying premises for portion of Friday and for portion of Saturday. I think that is a good ground on which to place our decision. Notwithstanding his imprisonment, notwithstanding his conviction, as he was not detained for one entire day, he has not lost the franchise. *De minimis non curat lex.*

PALLES, C. B. :—

The principle of *Powell* v. *Guest* (3) has been followed both in this country and in England. It has also been recognised by Statute, and it must, I think, be now held to be firmly established.

It has been also held in this Court in *Martin* v. *Hanrahan* (2), that detention for safe custody until trial, in default of bail, constitutes, in the event of conviction, a break, as if it were detention under a sentence.

(1) Lawson, Notes, p. 35.

(2) 24 L. R. Ir. 127.

(3) 18 C. B. (N. S.) 81.

It has, however, been also determined here in *M'Carron* v. *Chambers* (1), that the principle *de minimis non curat lex* applies to the length of the period of detention which is relied on as constituting the break. The question thus is whether the period of detention in the present case, which did not extend over the entire of any one day of the qualifying year, is more than the *minimum*? What is the *minimum*? I think that the most reasonable point at which to draw the line is by applying the rule that, save in certain exceptional cases, the law will not take notice of parts of a day. In other words, that the *minimum* is a "legal day."

Larkin v. *Clarke* (2) was not decided upon the maxim *de minimis*, but on the ground that the two tenancies under which the claimant occupied should be in immediate succession to each other, and that the occupation of the landlord during a short period not amounting to a day was sufficient to prevent the occupations under the two tenancies being in immediate succession.

FITZ GIBBON, L. J.:—

In *Powell* v. *Guest* (3), Byles, J. says:—"It is not necessary or convenient to lay down any universal rule on the subject" of continuous residence, and I must add that I find it impossible to discover any principle which will reconcile all the decisions upon it. But I am glad to decide this case upon the subtle point, that the voter was not absent from his residence for the whole of any one legal day. His "misfortune" was his "fault," but it began late on one day and ended early on the next; and therefore his case is not ruled by *Martin* v. *Hanrahan* (4), where the claimant was "in gaol two days."

If we have hereafter to consider the case of a "criminal" who has been imprisoned for the twenty-four hours of a full legal day, and to apply the rule of Morris, C. J., that "it is the criminality that makes the difference, and not the length of the detention," I shall not be inconsolable if he loses the franchise, even though another man may be imprisoned from 1 a.m. to-day until 11 p.m. to-morrow—forty-six hours—and remain "a capable citizen."

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(1) 28 L. R. Ir. 294.
(2) Lawson, Notes, 69.
(3) 18 C. B. (N. S.) 81.
(4) 24 L. R. Ir. 127.

I still feel my old difficulty. I cannot see how a man's innocence or guilt can alter the fact of his occupation, either of his own house or of Her Majesty's gaol.

BARRY, L. J., concurred.

Solicitors for the appellant: *Miller, Caldwell, & Gilliland.*
Solicitor for the respondent: *O'Doherty.*

G. Y. D.

BOYD *v.* GREAT NORTHERN RAILWAY CO. (1).

Ex. Div.
1895.
May 10.

Railway Company—Level crossing—Unreasonable and negligent delay in opening gates—Obstruction of highway.

The plaintiff, a medical doctor, whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the servants of the defendant Railway Company in opening the gates at the crossing:—

Held, that the defendants were liable in damages to the plaintiff for such delay.

Case stated for the opinion of the Court by Mr. Justice Gibson, pursuant to the provisions of the statute 27 & 28 Vict., c. 99.

His Lordship stated as follows:—

This case came before me on appeal by the plaintiff from a dismiss pronounced by the County Court Judge of the county Donegal. I refer to the process, which was for keeping the gates of the level crossing between Strabane and Lifford closed for an unreasonable time. For the plaintiff, Mr. Dane relied on the Railways Clauses Act, 1845, sect. 47, and the Act of 1863, sect. 5, prohibiting shunting. He referred to *Wyatt* v. *Great Western Railway Company* (2). On behalf of the defendants Mr. Horner contended that there was no delay, and that no action lay.

The facts were as follows:—Dr. Boyd, the plaintiff, is surgeon to the County Infirmary at Lifford, and medical officer to the Poor Law Union of Strabane, and a medical man in very large practice, whose time is of considerable value, and who constantly passes over the crossing.

On the 3rd December, 1894, he was driving to visit a patient, and was detained by the gates being kept shut from 4.55 to 5.15 p.m., a period of twenty minutes. It was the case of the defendants that the gates were open at the time and that the

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(1) Before Andrews and Murphy, JJ.

(2) 34 L. J., Q. B. 204.

Ex. Div.
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Boyd
v.
Gt. Northn. Railway Co.

line was clear. I found as a fact that the plaintiff was delayed for twenty minutes by the gates being kept shut, and the shutting of the gates was not occasioned by any necessity from transit of railway traffic or otherwise; that the delay was unreasonable, and the result of negligence on the part of the defendants, and that the public highway was thereby obstructed for twenty minutes, and that the plaintiff, whose time was of pecuniary value, had sustained pecuniary damage from delay, which I estimate at 10*s*.

No specific pecuniary loss was proved. No other person was on the railway at the time the plaintiff was so delayed. Other instances of delay were mentioned by the plaintiff, particularly one on the 18th December, a market day, on which he and numbers of persons were delayed from 2.10 p.m. to 2.25 p.m., a period of fifteen minutes. I did not, however, find it necessary to investigate and decide the alleged instance of neglect or default.

Mr. Horner relied on the *Caledonian Railway Company* v. *Ogilvy* (1); *Winterbottom* v. *Lord Derby* (2); Roscoe's *Nisi Prius*, p. 789; and Addison on Torts, p. 36.

The case seemed to be new, and I said I would state a case. Should any amendment of the process be necessary, if on the facts proved the defendants would be liable, such amendment is to be made. The question for the opinion of the Court is whether on the facts proved the defendants are liable to the plaintiff. If there is actionable liability, the decision is to be reversed and a decree awarded, otherwise the dismiss is to be affirmed.

Dane (with him *D. B. Sullivan, Q.C.*), for the plaintiff.

It has been found as a fact by the Judge that there was unreasonable delay on the part of the defendant company in opening the gates, and that in consequence thereof the plaintiff suffered damage. That brings the case within the scope of *Wyatt* v. *Great Western Railway Company* (3); and see also *dictum* of Cockburn, C. J. (4).

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(1) 2 MacQ. 229.

(2) L. R. 2 Ex. 316.

(3) 34 L. J., Q. B. 204.

(4) *Ibid.* p. 209.

There was no appearance for the defendant Company.

Andrews, J.:—

We have not had the advantage of hearing counsel for the Railway Company, who have not appeared on the argument of this case; but having regard to the findings of fact by Mr. Justice Gibson, I feel no difficulty in deciding the question he reserved for the opinion of the Court, viz. whether on the facts proved the defendants are liable to the plaintiff in this action. The Railway Company are not entitled either under the 47th sect. of the Railways Clauses Consolidation Act, 1845, or any other enactment to obstruct the public highway, which they obtained power to cross on a level, for a longer period than is reasonably necessary for their own authorised purposes, and the protection of the public using the highway; and even without any such expression of judicial opinion as is to be found in the case of *Wyatt* v. *The Great Western Railway Company* (1), I should have been quite prepared to hold the defendants liable in the present case. By the findings the only two material questions of fact are affirmatively determined, viz. whether the defendants on the occasion in question unreasonably and unnecessarily obstructed the highway, and if so, whether the plaintiff suffered thereby some appreciable damage peculiar to himself beyond that suffered by other members of the public ordinarily using the highway. The learned Judge has found that an actual delay of twenty minutes was occasioned by the defendants, not by any necessity arising from their traffic or otherwise, and that the delay was unreasonable, and the result of negligence on the part of the defendants. He has also found that the plaintiff is a medical man, in very large practice, whose time was of pecuniary value, and that he had sustained personal pecuniary damage from the delay of twenty minutes, which the learned Judge estimated at ten shillings. Everything, therefore, which is necessary in point of law to entitle the plaintiff to recover damages in this action, has been established in point of fact, and our answer to the question reserved for our opinion must be that on the facts proved the defendants are liable to the plaintiff.

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(1) 6 B. & S. 709; 34 L. J., Q. B. 204.

Ex. Div.
1895.

BOYD
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RAILWAY CO.

The learned Judge will, upon our decision being communicated to him, reverse the dismiss, and give the plaintiff a decree for ten shillings, with such costs as he shall think it proper to award, and we shall order the defendants to pay to the plaintiff £10 for the costs of the argument before us.

MURPHY, J., concurred.

Solicitor for the plaintiff: *P. Gallagher.*

J. P. B.

In the MATTER of the ESTATE of FLORINDA BATESON, a Vendor of Land (1).

Land Com.
1895.

May 17.
June 1.

Rentcharge—Statute of Limitations—Advance by Land Commission to enable tenant to purchase holding—Land Law (Ireland) Act, 1881, *sect*, 24, *sub-sect.* 1 (a), *sect.* 28—*Purchase of Land (Ireland) Acts*, 1885 *to* 1891.

An order of the Land Commission, sanctioning an advance to a tenant to enable him to purchase his holding under the Purchase of Land (Ireland) Acts, 1885 to 1890, does not prevent the Statute of Limitations from running so as to extinguish a rentcharge issuing out of the lands.

The principle of *In re Colclough's Estate* (8 Ir. Ch. R. 330) and *In re Nixon's Estate* (Ir. R. 9 Eq. 7) is not applicable to proceedings in the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1891.

The nature and functions of the Land Commission in land purchase transactions considered.

Objection to the final schedule of incumbrances claiming to have a yearly rentcharge of £300, no payment on foot of which had been made since 3rd May, 1881, inserted thereon.

Meredith, *Q.C.*, and *W. M. Jellett*, for G. M. Harris, in support of the objection, contended that the orders sanctioning the advances, made in August and December, 1889, prevented the rentcharge being barred by the Statute of Limitations, and referred to *In re Colclough's Estate* (2); *In re Nixon's Estate* (3); *Irish Land Commission* v. *Davies* (4); *In re Stinson's Estate* (5); *Howlin* v. *Sheppard* (6).

Walker Craig, *Q.C.*, and *Wakeley*, for the vendor:—

The purchase is a transaction *inter partes*, and the Land Commission only sanctions the advance. [Counsel referred to *In re Henry's Estate* (7), and *Bennett* v. *Bernard* (8).]

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(1) Before Bewley, J.

(2) 8 Ir. Ch. R. 330.

(3) Ir. R. 9 Eq. 7.

(4) 27 L. R. Ir. 334, at p. 348.

(5) 29 L. R. Ir. 490.

(6) Ir. R. 6 Eq. 38.

(7) 31 L. R. Ir. 158.

(8) 12 Ir. Eq. R. 229.

Land Com.
1895.

In re
BATESON'S
ESTATE.

June 1.

BEWLEY, J.:—

This case came before me on an objection by George Michael Harris to the final schedule of incumbrances, and raises a question of some importance.

By an indenture dated the 30th April, 1879, the Hon. Florinda Bateson, the vendor in this matter, granted to Elizabeth Kennedy, her heirs, executors, administrators, and assigns, an annuity or yearly rentcharge of £300, to be issuing, and payable out of, and charged upon, the lands of Croaghburgess, called the house and demesne of Croagh, and that part of the demesne called Water Park, Blansher, the Deer Park, and Fairfield of Croagh, Stallnagour, otherwise Shagnagour, now called Smithfield, Charles Park, Smith Park, and O'Brien Meadow, and Ballycannon, containing 684A. 1R. 2P. statute measure, situate in the barony of Lower Connelloe, and county of Limerick.

Elizabeth Kennedy died on the 3rd May, 1881, but did not by her will or otherwise devise or dispose of this annuity or rentcharge, or any part thereof. At the date of the death of Elizabeth Kennedy, Robert Fanning Harris was her heir-at-law. He died on the 27th July, 1882, having previously made his will, dated the 2nd September, 1879, and thereby devised and bequeathed all his real and personal estate to his wife Sarah Maria Harris.

She died intestate on the 16th October, 1892, and George Michael Harris, the objector, is her eldest son and heir-at-law. George Michael Harris would now be entitled to the rentcharge created by the deed of the 30th April, 1879, if it is still subsisting, but no payment has been made in respect of it since the death of Elizabeth Kennedy on the 3rd May, 1881, and the vendor in the final schedule of incumbrances denies the existence of any liability and contends that any claim in respect of the rentcharge is barred by the Statute of Limitations.

George Michael Harris objects to this statement on the final schedule of incumbrances, and submits that, having regard to the proceedings herein, the rentcharge is still a valid and subsisting charge on the lands above referred to, and is not barred by the Statute of Limitations.

As admittedly no payment of the rentcharge has been made since the 3rd May, 1881 (which appears, from the affidavits, to be the true date of Mrs. Kennedy's death), the claim of George Michael Harris is *prima facie* barred by the provisions of section 1 of the Real Property Limitation Act, 1874, and the *onus* lies on the objector to show that the operation of the statute has been in some way suspended.

Counsel for the objector have accordingly argued that the principle of *In re Colclough's Estate* (1) and *In re Nixon's Estate* (2) is applicable, and that the proceedings for sale in the Land Commission have prevented the Statute of Limitations from running.

In the earlier of these cases it was held by the Court of Appeal in Chancery, then consisting of Brady, C., and Blackburne, L.J., that where an order for sale was made by the Incumbered Estates Court, that order was to be considered as having been made on behalf of every person who had an interest in the proceeds of the sale, and that a person thus interested was exonerated from the necessity of taking proceedings which might otherwise have been necessary to prevent his claim being barred by the Statute of Limitations. In *In re Nixon's Estate* (2) it was held by the same Court, then constituted by Lawson, J. (one of the Lords Commissioners for the custody of the Great Seal), and Christian, L.J., that an absolute order for sale made on an owner's petition to the Landed Estates Court for the sale of lands charged with a legacy bars the operation of the Statute of Limitations as against the legatee. In each of these cases the order for sale was an order that the lands should be sold *for the purpose of discharging the incumbrances thereon.* Under the 30th section of the Incumbered Estates Court Act (12 & 13 Vict. c. 77), and the 64th section of the Landed Estates Court Act (21 & 22 Vict. c. 72), the purchase-money was necessarily applied (after payment of the costs and expenses of, and incidental to, the sale) in or towards payment or satisfaction of the incumbrances or charges which affected the lands sold; and an order for sale must be taken as an order made substantially for the benefit of every incumbrancer who would be paid out of the *corpus* of the estate when sold.

In *Nixon's Estate* (2), Christian, L.J., interpreted the concise judgment of Blackburne, L.J., in *Colclough's Estate* (1), as having the following effect:—

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(1) 8 Ir. Ch. R. 330.

(2) Ir. R. 9 Eq. 7, at p. 15.

"The form of an order for sale is that the lands be sold for the purpose of discharging incumbrances thereon. Two things seem to be thereby adjudged, first, a conversion of the land into money; second, a distribution of that money among the incumbrancers, that is to say, among those whose claims then, *i.e.* at the date of the order, bind the land. So that when after an interval, which might be more or less according to the delays of the Court, or of the party having the carriage of the matter, a claimant against whom the twenty years had not run at the date of the order, but have run since, files his claim, or rather his objection to the omission of his claim from the schedule of incumbrances, that objection is not 'an action, suit, or other proceeding brought to recover a sum of money charged upon or payable out of any land or rent,' but rather a complaint that he has not been placed in that position against the money fund which the order for sale had adjudged to all that were then incumbrancers. Thus, the question of the statute would be thrown back from the time of filing the objection to that of the order for sale."

Taking this as the principle of the decisions in *Colclough's Estate* (1), and *Nixon's Estate* (2), it is necessary to consider whether the proceedings in the Land Commission in the present case have an effect similar or analogous to that of an order for sale in the Landed Estates Court.

Has there been an adjudication by a Court of competent jurisdiction that the lands, the subject of these proceedings, should be converted into money, and that the money should be applied in payment of all incumbrances affecting the lands at the date of the order?

Before referring to the actual proceedings in the present case I think it desirable to make some observations on the nature and origin of the functions of the Land Commission in land purchase transactions, as there seems to be some misapprehension or confusion of thought on the subject.

State aid to tenants to enable them to purchase their holdings by advances of public money was first introduced into this country by the provisions commonly known as the Bright Clauses of the

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(1) 8 Ir. Ch. R. 330.

(2) Ir. R. 9 Eq. 7.

Landlord and Tenant (Ireland) Act, 1870. These well-intentioned clauses proved a complete failure, owing principally to the cumbrous and costly procedure necessary to carry them into effect; and they require but a passing notice. An application to the Landed Estates Court was requisite to carry out the agreement for sale, and procure a statutory conveyance from the Court, and an expensive investigation of title was of course involved. An application to the Commissioners of Public Works was necessary to obtain an advance of part of the purchase-money, which could not exceed two-thirds; and, finally, an application had to be made to the Civil Bill Court to make an order charging the holding with an annuity to secure repayment to the Board of Works of the principal money advanced by them with interest. It is not surprising that these provisions were found to be unworkable, and accordingly they were amended by the Landlord and Tenant (Ireland) Act, 1872 (35 & 36 Vict. c. 32), which in section 1, subsection 3, contained the following enactment:—

"Notwithstanding the sale to a tenant by his landlord of his holding may not have been made in or through the medium of the Landed Estates Court, the Board may, if satisfied of the value of the security, agree to advance to such tenant for the purpose of purchasing his holding any sum not exceeding two-third parts of the value of such holding, as assessed by the Board, and may take as security for the repayment of such advance a charge on such holding of an annuity of the same duration and amount as would have been charged thereon if the sale had been made in the Landed Estates Court; but no such advance shall be actually paid to the tenant until the Board are satisfied with the title of the tenant, and have taken from him a charge on the holding, in such form and with such powers of sale and covenants for payment as the Board may be advised will effectually secure the annuity charged in their favour, and with the like powers for the recovery of such annuity as are contained in the principal Act in respect of the recovery of annuities under the said Act."

After the passing of this Act, where a tenant was desirous of purchasing his holding with the aid of moneys advanced by the State, and the landlord was able and willing to sell, the transaction could be carried out without the intervention of any Court. The

Board of Works ascertained the value of the holding by the aid of the Valuation Office, I believe, and investigated the title of the landlord through their solicitor; and if the security was sufficient, and the title satisfactory, an advance was made, and a conveyance was executed by the landlord to the tenant, and a deed of charge by the tenant to the Board of Works.

It could not be argued, I think, that in such a case the sanction of the Board of Works to an advance, whether expressed by a formal order or minute or otherwise, would stop the running of the Statute of Limitations against an incumbrancer on the landlord's estate. The Board of Works was in the position of a money lender, and not in that of a Court decreeing the sale of lands for the purpose of discharging incumbrances, and the consent of such a public body to advance money to a tenant to enable him to purchase his holding could have no more effect in suspending the operation of the Statute of Limitations than the consent of a bank to advance a like amount for a similar purpose.

The Land Commission was created by the Land Law (Ireland) Act, 1881, and by the 35th section of the Act it was provided that:—"All powers exercisable by the Board of Works under the Landlord and Tenant (Ireland) Act, 1870, and the Landlord and Tenant (Ireland) Act, 1872, in relation to the purchase by tenants of their holdings shall, after the passing of this Act, and subject to the provisions of this Act, be transferred to, and may be exercised by the Land Commission, and the said Acts and any enactments amending the same, so far as they relate to the matter aforesaid, shall be construed as if the Land Commission were substituted for the Board."

By section 24, it was enacted, in sub-section 1, that "The Land Commission out of moneys in their hands may, if satisfied with the security, advance sums to tenants for the purpose of enabling them to purchase their holdings, as follows, that is to say:—(*a*) Where a sale of a holding is about to be made by a landlord to a tenant in consideration of the payment of a principal sum, the Land Commission may advance to the tenant for the purpose of such purchase any sum not exceeding three-fourths of the said principal sum."

And by sub-section 3 it was provided:—"Where an estate is

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Bewley, J.

subject to incumbrances, or any doubt arises as to the title, the Land Commission, if satisfied with the indemnity or terms given by the landlord, may themselves indemnify the tenant against any such incumbrances, or any right, title, or interest, adverse to, or in derogation of, the title of the landlord, and any such indemnity of the Land Commission shall be a charge upon the consolidated fund, or the growing produce thereof."

Section 28 enacted that any advance made by the Land Commission for the purpose of supplying money for the purchase of a holding from a landlord should be repaid by an annuity in favour of the Commission for thirty-five years of £5 for every £100 of such advance, and so in proportion for any less sum; and that every such advance should be secured to the Commission, either in such manner as might be agreed upon between the Commission and the person to whom the advance was made, and as the Commission thought sufficient, or in manner provided by Part III. of the Landlord and Tenant (Ireland) Act, 1870, as amended by the Landlord and Tenant (Ireland) Act, 1872, in like manner in all respects as if the same were such an advance as is mentioned in those Acts, and as if the Land Commission were the Board therein mentioned, and as if the person receiving the money were a tenant or purchaser therein mentioned.

It will be seen from these provisions that the inception of the jurisdiction of the Land Commission in matters relating to the purchase by tenants of their holdings was the transfer to the Commission of the powers theretofore exercisable by the Board of Works, and although these powers were enlarged, the nature of such purchase transactions was not materially changed. The Land Commission instead of the Board of Works was entrusted by the State with the duty of advancing money to tenants to enable them to purchase their holdings. The sale was carried out, not by any judicial order of the Commission, but by the voluntary contract of the parties. For the protection of the State the value of the holding was ascertained, and the title of the landlord investigated, but the Land Commission was under no obligation to pay or satisfy the incumbrances affecting the estate of the landlord. If such existed, they should be discharged by the landlord, or he should give such an indemnity against them as was deemed satisfactory by the Commission.

The Purchase of Land (Ireland) Act, 1885 (commonly referred to as the "Ashbourne Act"), did not establish any new system of Land Purchase in Ireland, but amended and extended the powers given to the Land Commission by the Land Act of 1881. It was, as its title indicates, "an Act to provide greater facilities for the sale of land to occupying tenants in Ireland." It enabled the Land Commission, *inter alia*, to advance the entire of the price payable by a tenant instead of three-fourths, provided the repayment of the advance is secured by a guarantee deposit; it empowered the Land Commission to make a vesting order conferring an indefeasible title, in lieu of a conveyance, in cases where it has been agreed between the Land Commission and the landlord and tenant that the sale shall be carried into effect by means of a vesting order; and in such case, as also in cases where the Land Commission sells a holding forming part of an estate purchased by it for resale to the tenants, the Land Commission by section 10 was given certain powers vested in the Land Judge of the Chancery Division by certain sections of the Landed Estates Court Act. Other amendments were made by the Land Law (Ireland) Act, 1887, the Purchase of Land (Ireland) Amendment Act, 1888, the Purchase of Land (Ireland) Amendment Act, 1889, and the Purchase of Land (Ireland) Act, 1891, which it is unnecessary, for the purpose of this case, to notice in detail. The object of such amendments was not to alter the fundamental character of these land purchase transactions, but to facilitate the sale and conveyance of holdings to occupying tenants, and to secure the repayment of the advances made by the State. The advances made to tenants to enable them to purchase their holdings in cases like the present are now made under the powers given to the Land Commision by Part V. of the Land Act of 1881, as amended and enlarged by the subsequent Statutes.

Under the Land Purchase Rules of the 5th December, 1887, where a landlord had contracted to sell an estate or land not the subject of proceedings before the Land Judges, or contemplated the purchase thereof by tenants, he was bound to lodge in the

Land Commission either before or contemporaneously with the first agreement for sale an originating statement in the form prescribed by the rules. This originating statement is in no respect analogous to a petition for sale in the Land Judge's Court. Its lodgment does not confer any jurisdiction on the Land Commission, nor has it in fact any operation whatever unless agreements for sale of some of the lands mentioned in it are entered into, and applications for advances are made in respect of them. The statements contained in it as to the nature of the landlord's title, the charges and incumbrances affecting the lands, and the mode in which the sales are proposed to be carried out, then form a basis for carrying out the intended sales. Each agreement for sale in respect of which an advance is sanctioned constitutes in fact a separate transaction, though a number of such transactions may for purposes of convenience be dealt with as constituting together one matter, viz. the matter of the estate of the vendor.

In the present case an originating statement was lodged by Mrs. Bateson on the 18th December, 1888, but in the schedule of incumbrances annexed to it no reference was made to the annuity or rentcharge created by the deed of the 30th April, 1879.

Agreements for the sale of portions of the lands comprised in the originating statement were subsequently lodged, and the agreements as well as the originating statement stated that it was proposed to carry out the sales by means of conveyances.

The applications for advances were in the first instance refused for insufficiency of security, but the vendor having agreed to reduce the amount of the purchase-money in the case of seven holdings, applications for the advance of the reduced amounts were sanctioned by the late Mr. Commissioner Mac Carthy at different dates in the months of August and December, 1889.

On the 10th September, 1894, apparently by consent of the parties, the orders sanctioning the advances were rescinded, and the applications for advances under the agreements before-mentioned were dismissed, and fresh agreements which had been entered into under the Purchase of Land (Ireland) Act, 1891, applying for advances of the same nominal amount in Guaranteed Land Stock as had been previously sanctioned in cash, and proposing to carry out the sales by vesting order, having been lodged, orders were made also on the 10th of September, 1894, sanctioning the several advances applied for.

The dismissal of the original applications, and the lodging of the fresh agreements do not appear to me to materially affect the question to be decided in this case.

The objector cannot, I think, be in a better position than if the sales had been carried out by conveyance in the manner originally proposed. In such case the functions of the Land Commission would have been those of a public body lending public money, and taking security for the advances. The Land Commission would have taken no part in vesting the holdings in the tenant-purchasers. The provisions of section 10 of the Ashbourne Act would not have applied; and there would not have been any settlement of a schedule of incumbrances. If the Examiner was of opinion that the vendor, either alone or with the concurrence of other parties who were willing to join, had a sufficient title to convey an estate in fee-simple free from incumbrances, the necessary conveyances would have been executed to the purchasing tenants. The deed creating the rentcharge would have appeared on the searches in the Registry of Deeds Office; but on a statutory declaration being made that no payment on foot of it had been made for twelve years and upwards, the Examiner might well have been satisfied that no liability existed. If there was any doubt on the subject an indemnity might be taken by the Land Commission from the vendor.

If the sales had been completed in this way, would the rentcharge created by the deed of the 30th April, 1879, have been a subsisting charge on the lands in the hands of the tenant-purchasers? No grounds can be suggested for staying the operation of the Statute of Limitations save the effect of the orders sanctioning the several advances. I assume, for the purposes of this case, that an order sanctioning an advance is to be regarded as a judicial act of the Land Commission, but I am not to be taken as expressing any opinion on the subject. As I have had occasion more than once to point out, the Land Commission, though occupying the position of a Court for certain purposes, is also a department of the State, entrusted with various duties of an administrative character.

The 3rd section of the Purchase of Land (Ireland) Amendment Act, 1888, no doubt, requires that "the approval of the Commissioners to the sanction of any advance shall be signified by an *order* as of date on which such approval was made"; but it may be that such orders should not be orders of "the Court of the Land Commission," as they are at present expressed to be, but orders of "the Land Commission," similar in character to the orders made by the Board of Works under the Land Improvement Acts. However, taking the order sanctioning an advance by the Land Commission as an order of a judicial nature, does it amount to a direction that the lands shall be converted into money, and the money applied in discharge of incumbrances? The form of the order, which is endorsed in the fold of the agreement for purchase, is as follows:—"It is ordered by the Court that, subject to the requirements of the statutes and General Rules applicable to the case being complied with, and a guarantee deposit of £   being provided, £   be advanced to the within-named tenant for the purchase of the holding within described."

In cases carried out by conveyance the conversion of the land into money is effected by the act of the parties, and not by any order of the Court. The form of the agreement for purchase is that "in case the Land Commission shall advance the sum of £   to the tenant for the purchase of his holding, the landlord will sell, and the tenant will purchase the same." So that no conversion actually takes place until the advance is made. But even if the order sanctioning an advance could by any means be construed as working a conversion of the land into money, I fail to see how it could be held to amount to a direction that the money should be applied in discharge of incumbrances.

The Land Commission, I may observe, had no power to apportion or redeem annuities or rentcharges until after the passing of the Land Act of 1887, and even still the apportionment or redemption of an annuity or rentcharge is a matter wholly in the discretion of the Land Commission (see sect. 16 of Land Act of 1887). Though in practice such annuities and rentcharges are invariably, or almost invariably, redeemed, the owner of the annuity or rentcharge has no legal right to insist on the redemption.

But whatever the nature of the incumbrances affecting the landlord's estate may be, and whether the sales be carried out by conveyance or vesting order, an order sanctioning an advance cannot, in my opinion, by any reasonable construction, be held to amount to an adjudication that the land shall be converted into money, and the money applied in discharge of the then existing incumbrances. The cases of *In re Colclough's Estate* (1) and *In re Nixon's Estate* (2) appear to me to have no application.

Where lands were being sold in the Incumbered Estates Court, in the Landed Estates Court, or by the Land Judge of the Chancery Division, expressly for the purpose of paying incumbrances, the law would be strangely defective if every mortgagee against whom the Statute of Limitations was running should be obliged to file an independent and wholly useless petition for sale to save his charge from being barred. But where a landlord is voluntarily selling portions of his estate to the occupying tenants, and application is made to the Land Commission to advance the purchase moneys no reason exists why the pendency of the sales should speciall protect an incumbrancer from the operation of the Statute Limitations.

The objection of Mr. George Michael Harris to the schedu of incumbrances must be overruled, with costs.

Solicitor for the objector: *Ross Todd.*
Solicitor for the vendor: *E. C. Jameson.*

T. H. M.

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(1) 8 Ir. Ch. R. 330.

(2) Ir. R. 9 Eq. 7.

IN RE HARPER, AN INFANT (1).

Q. B. Div.
1894.
Dec. 20.

Habeas corpus—*Custody of infants—Judicature* (*Ireland*) *Act*, 1877, s. 28 (10).

In proceedings by *habeas corpus* in the Queen's Bench Division in matters relating to the custody and education of infants, the equitable jurisdiction conferred by section 28 (10) of the Judicature (Ireland) Act, 1877, is ancillary to the legal jurisdiction of the Court, and the applicant must still show that he *prima facie* possesses a legal right to the custody.

HABEAS CORPUS.

This was an application on behalf of Miss Matilda Phillips, a maternal aunt of the infant, to make absolute, notwithstanding cause shown, a conditional order for a writ of *habeas corpus ad subjiciendum*, directed to Mrs. Eliza Harper (the infant's paternal grandmother), and Margaret and Eliza Harper, her daughters.

It appeared from the applicant's affidavit that William Harper married her sister, a Roman Catholic, and became a Roman Catholic shortly before his death in 1889. His wife died some months afterwards. The infant, Claude Harper, was the issue of this marriage. The applicant alleged that the mother of the infant, before her death, expressed a desire that the applicant and her family should take charge of the child; that since the mother's death the child had been (save for two visits to Mrs. Eliza Harper each of about a month's duration in the summers of 1892 and 1893) in the custody of the applicant down to September, 1894; but that on the occasion of the applicant's sending the infant on a third visit to Mrs. Eliza Harper in that month, preliminarily to sending him to a Roman Catholic boarding school, Mrs. Harper acted differently, and when the time came for taking him away in order to send him to school she objected to restore the child to the applicant's custody or to permit him to be sent to a Roman Catholic boarding school.

Mrs. Eliza Harper, on the other hand, alleged that the applicant was a young woman entirely without means, residing with her father, who until recently had been postmaster of Sligo, and that until recently the infant had generally resided in the house with her, this being the applicant's father's house and post-office; that Mrs. Eliza Harper did not object so long as the infant was properly cared and kept there, Mr. Phillips being, or seeming to be, well-off and able to support and educate him; that, however, the circumstances had changed; that Mr. Phillips had in July, 1894, been adjudicated a bankrupt, and, as the result of the bankruptcy and other proceedings, had no longer a home to offer to the infant; that the application was not made by Mr. Phillips though it was really in his care that the infant had been till then; that after Mr. Phillips got into difficulties the infant wrote to her (Mrs. Harper) saying that he was in want of necessaries and was coming on a visit to her; that he came to her by himself, being sent (as she believed) by Mr. Phillips because of the position of his affairs and his inability further to provide for the child; that he had since been resident with her (Mrs. Harper) who was well able to support and educate him, and was reluctant to give him up to a young lady who could not do so; that the applicant was no longer living with her father, and that she (Mrs. Harper) had no desire nor intention to interfere with the religious education of the infant.

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(1) Before HARRISON, HOLMES, and MADDEN, JJ.

An affidavit was subsequently filed by one Thomas Phillips, a brother of the applicant, who stated that, for the purpose of securing for the infant the benefits of a good Catholic education and of removing him entirely from the dangers to his religious faith which would be inseparable from his present position, he was willing and undertook to be responsible for his maintenance and education at such Roman Catholic school as he should select and as might be approved by the Court, adding that he possessed the means requisite to enable him to carry out his undertaking.

D. F. Browne (*T. M. Healy* with him), for the applicant:—

The order for a writ of *habeas corpus* should be made absolute; or, even if the applicant is not strictly entitled to the custody, still the Court is now seized of the matter, and is bound to exercise the equitable jurisdiction conferred upon it by the Judicature Act, 1877, sect. 28, and should, acting in the interests of the infant, avail itself of the offer made by a solvent person, an uncle of the infant.

O'Shaughnessy, Q.C., and *Fetherstonhaugh*, contra :—

The applicant has no legal right to an order for the custody of the infant, and the application for the writ of *habeas corpus* must therefore fail. Even if she had such right the Court should not under the circumstances of the case interfere as against the respondent.

T. M. Healy, in reply.

Harrison, J. :—

We are all of opinion that the applicant in this case has not shown that she possesses any legal *status* such as would entitle her to an order of this Court taking the infant out of the custody of his grandmother and handing him over to her. The existence of dangers, which (it is alleged) may occur to affect the child, is not sufficient. The applicant must in the first instance show that she has a legal right to the custody. This she has, in my opinion, failed to do, and her application must therefore be refused.

Holmes, J. :—

We start in this case with the fact that, since the death of the infant's last surviving parent, he was in the custody of his maternal grandfather, down to September, 1894. In that month the grandfather fell into difficulties, losing his means and becoming bankrupt, and, upon his being thus rendered unable to maintain the child, the custody of the latter was transferred, in some way which does not appear very clearly from the evidence before us, except in so far as it is shown by the letter of the child himself, to his paternal grandmother, where he now is.

Under these circumstances his maternal aunt, who looked after him while he was in his grandfather's house, but who has never had any means of her own to support him, applies to this Court for a writ of *habeas corpus* in order that the custody of the child may be given to her.

Q. B. Div.
1894.

In re HARPER.

Holmes, J.

She has shown no legal right to the custody; and, indeed, Mr. Browne, in opening the motion admitted that he did not think that he could maintain the application so as to take the child from the grandmother, with the view of handing him over to his client. His case, as he now presents it, is that it is the duty of the Court to inquire into what is best for the welfare of the child, and to give directions as to his guardianship and education. He contends that the child, whose father was a Roman Catholic, and who has been hitherto brought up in that faith, is now in danger of having his religious convictions altered by his residence with his grandmother, a Protestant; and that the Court ought to appoint as his guardian an uncle, of whose means and position we know nothing, and who is not a party to this litigation, on the faith of a written undertaking from the uncle that he will maintain the infant and pay for his education in an English school.

It seems to me that the case thus presented rests upon a complete misapprehension of the functions of this Court, and its duties. Prior to the Judicature Act, where an application was made for a writ of *habeas corpus* for the purpose of obtaining the custody of an infant, the applicant was obliged to show that he had a legal right to the custody; and, if he established such right, this Court had no alternative but to hand over the infant to him, even though the Court of Chancery might consider him a person unfit to be entrusted with the care of the child, and even though in a few weeks that Court might appoint another guardian. Since the passing of the Judicature Act, however, this Court has the same jurisdiction as the Court of Chancery to consider what is for the welfare of the infant, and even where an applicant for a writ of *habeas corpus* possesses *prima facie* a legal right to the custody, we are at liberty to refuse the writ if we are satisfied that in the interests of the child it ought not to be granted. In such a case I apprehend that this Court would have jurisdiction to take the child into wardship, and exercise the powers of guardianship and control which are usually put in force by the Chancery Division.

But this action of the Court turns, and must necessarily turn, upon the applicant having first shown that he possesses *prima facie* a legal right to the custody. It is this which entitles him to apply for the writ of *habeas corpus*, and it is in answer to his application that the matters to which I have referred can be legitimately discussed. It would be a dangerous departure from the procedure and practice of our Court to hold that a writ of *habeas corpus* might be applied for, in respect of a child not the subject of wrongful detention, by an applicant who was not entitled to his custody, with the indirect object of having him made a ward of Court, and of having a third party appointed his guardian. There is a way familiar to lawyers in which this can be effected, and if, in the case before us, it is thought desirable to take steps for this purpose, we must leave the parties to follow the ordinary course of law.

Madden, J.:—

There is no doubt whatever that since the Judicature Act this Court possesses the equitable jurisdiction of the Court of Chancery, not only by reason of the fusion of the Courts in the High Court of Justice, but also by the express provision of section 28 (10) of the Judicature Act, which enacts that, "In questions relating to the custody and education of infants the rules of equity shall prevail." But how is that jurisdiction to be invoked? The Court of Chancery exercised the functions of the Crown as *parens patriæ*. Thus, where it became necessary, it superseded the legal and natural guardianship, appointed a guardian under the Court, and gave all necessary directions as to custody and education. This jurisdiction was not founded on legal rights, and it could be invoked by any person interested in the infant, although such person was not legally entitled to the custody, and the same principle now applies to proceedings in the Chancery Division. So far as the original jurisdiction of this Division is concerned, I believe that it can only be invoked at the instance of a person legally entitled to the custody of an infant. Before 1877, in cases of custody of infants, the Court of Queen's Bench, upon motion for *habeas corpus*, was obliged simply to give effect to legal rights. Therefore, where a person came in to the Court of Queen's Bench, and proved that he was legally entitled to the custody of an infant, the Court had no alternative but to give effect to such right, although facts appeared which rendered it certain that the Court of Chancery would deprive him of the custody in the course of a few days.

The main result of the Judicature Act is that this Court is not bound to give effect to legal rights, where by so doing it would act inconsistently with the principles recognised by the Chancery Division. But, whatever the equitable jurisdiction may be which this Court can exercise in such cases, that jurisdiction must be invoked by a person legally entitled to the custody of the infant. The legal jurisdiction of the Court has not been invoked in the present case, and therefore we have no power to exercise an equitable jurisdiction, which is only ancillary to the original jurisdiction vested in the Court of Queen's Bench.

Order discharged, without costs.

Solicitor for applicant: *Daniel Purcell.*
Solicitor for Mrs. Harper: *W. R. Fenton.*

A. E. R. J.

REG. (HERBERT) *v.* JUSTICES OF KILDARE (1).

Q. B. Div.
1895.
May 3.
June 13.

Justices—Summary jurisdiction—"Penalty"—Costs—Petty Sessions (Ireland) Act, 1851 (14 *&* 15 *Vict. c.* 93), *section* 22—*Small Penalties (Ireland) Act*, 1873 (36 *&* 37 *Vict. c.* 82), *sections* 3, 4, 6.

The Small Penalties (Ireland) Act, 1873, which defines "penalty" as including any sum of money recoverable in a summary manner, and which, by sect. 6, is made to apply to penalties, "including costs," does not thereby authorise the addition of the costs to the penal sum, so as either to extend the power of imprisonment in default of payment, or to exclude the operation of the Act where any costs are awarded in addition to a fine of £5, the maximum penalty under the Act.

Certiorari.

The applicant had been summoned to appear before the Justices at Petty Sessions at Robertstown in the county Kildare for a breach of the Licensing Laws, viz. for selling intoxicating liquor to a drunken person (35 & 36 Vict. c. 94, s. 13). On the hearing of this summons the Justices convicted the applicant, and by their order imposed "a fine of £5, and 2*s.* 6*d.* costs, and in default to be imprisoned in Kilkenny gaol for two calendar months." The applicant obtained a conditional order to remove and quash this order of conviction on the grounds that same was without and in excess of jurisdiction; and "that, within the meaning of The Small Penalties (Ireland) Act, 1873, 'penalty' includes costs, and the fine of £5, and 2*s.* 6*d.* costs is equivalent to a fine of £5 2*s.* 6*d.*; and that the award of imprisonment without a previous distress is illegal, imprisonment without any warrant of distress being imposable only where the 'penalty' does not exceed £5" (2). The Justices showed cause against the conditional order.

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(1) Before Sir P. O'Brien, C.J., and O'Brien, J.

(2) The Small Penalties (Ireland) Act, 1873 (36 & 37 Vict. c. 82), provides: Section 3. "The word 'penalty' in this Act shall include any sum of money recoverable in a summary manner.

ection 4. "Where upon Ssummary conviction any offender is adjudged to

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KILDARE.

G. D. Keogh, for the Justices:—

By sect. 22 of the Petty Sessions Act, the *costs* are kept quite distinct from the *penalty*; sub-sect. 9 of that section, under which alone the Justices had jurisdiction to award costs at all, is clearly inconsistent with the idea that "penalty" means the penal sum *plus* the costs which are awarded therewith; or that the term of imprisonment, varying with the "penalty," can be in any way affected by the addition thereto of the sum given as costs. If a person was fined 10*s.* and 2*s.* 6*d.* costs, and the order provided for a distress, and in default for imprisonment for one week; if the person so convicted underwent the week's imprisonment, his civil liability for the costs would not be thereby discharged. So, again, in the case of the same fine and penalty, an order for imprisonment for a term exceeding one week would be manifestly bad. The costs are "recoverable in a summary manner," like the penalty, *i. e.* under the Justices' warrant for distress; but im-

pay a penalty not exceeding £5, such offender, in case of non-payment thereof, may, without any warrant of distress, be committed to prison for any term not exceeding the period specified in the following scale, unless the penalty be sooner paid:—

For any penalty—	*The imprisonment not to exceed—*
Not exceeding 10*s*,	Seven days;
Exceeding 10*s*., and not exceeding £1,	Fourteen days;
Exceeding £1, but not exceeding £2,	One month;
Exceeding £2, but not exceeding £5,	Two months.

Section 6. "This Act shall apply to penalties, including costs, recoverable in a summary manner in pursuance of any Act of Parliament, whether passed before or after the commencement of this Act; and all provisions of any Act of Parliament authorising, in the case of non-payment of a penalty not exceeding £5, a longer term of imprisonment than is provided by this Act, shall be repealed."

The Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), provides:

Section 22, sub-sect. 2: "In every case where the Justices shall award any penal or other sum to be paid, they may order that, in default of the said sum being paid at the time and in the manner directed by their order, the goods of the person against whom the said order shall be made shall be distrained for such sum, or for so much of such sum as shall remain unpaid at the time fixed, and also for the costs of such distress.

Sub-sect. 3: "In every case of an offence where they shall order that a disprisonment is not a means of recovering either penalty or costs; it is itself a penalty in substitution for the fine.

The Small Penalties (Ireland) Act, 1873, was intended only to obviate the necessity for the warrant of distress in small cases, and to effect a modification in the scale previously in force. The repeal in sect. 6 is strictly limited to this latter point. The provision in that section that the Act "shall apply to penalties *including* costs" must be taken to have been intended to prevent any difficulty arising as to the power of the Justices to award costs in an order of conviction framed under this Act, and not to provide for the incorporation of the costs with the penalty for the purpose of measuring the period of imprisonment.

Reg. v. *Justices Warwickshire* (1), was a case under 12 & 13 Vict. c. 92. By sect. 14 of that Act a party convicted by a Justice shall pay such penalty, damage, or compensation, as the Justice shall adjudge, together with the costs of conviction, to

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tress shall be made in default of payment of any penal sum, they may order that in default of the said sum being paid as directed, the said person shall be imprisoned for any term not exceeding the period specified in the following scale:—

For any sum—	*The imprisonment not to exceed—*
Not exceeding 5*s*., ...	One week;
Exceeding the last, but not exceeding 10*s*.,	Two weeks;
Exceeding the last, but not exceeding £2,	One month;
Exceeding the last, but not exceeding £5,	Two months;

. . . .

and any such imprisonment shall be determinable upon payment of the said sum and costs and any costs of the distress, where a distress shall have been made, and such imprisonment may be directed in the same warrant as such distress; but if the said person shall admit, or if it shall be otherwise proved on oath, that he has no goods, or that a distress would be ruinous to him or his family, they may order that such person shall be imprisoned in the first instance for the like period for which he might be imprisoned in default of distress.

Sub-sect. 9: "In all cases the Justices may order that the defendant shall pay to the complainant, or in case of a dismissal that the complainant shall pay to the defendant, such sum, not exceeding 20*s*., for costs, as to such Justices shall seem fit, and the same shall be recoverable in the same manner as any penal or other sum adjudged to be paid by the Justices."

(1) 6 Ell. & Bl. 837.

be settled by such Justice; and, by sect. 25, an appeal is given to Quarter Sessions in all cases where the conviction shall exceed £2; and it was there held that an appeal only lay where the sum adjudged to be paid as penalty, damage, or compensation, exclusive of costs, exceeded £2.

Harney, for the applicant:—

Costs are by sect. 22, sub-sect. 9, of the Petty Sessions Act made recoverable in a summary manner—"in the same manner as any penal or other sum adjudged to be paid by the Justices," and are therefore within the definition of "penalty" in sect. 3 of the Small Penalties Act. Further, sect. 6 expressly says that the Act "shall apply to penalties *including costs*." This either altered or cleared up the ambiguity in the 22nd sect. of the Petty Sessions Act, just in the same way as did the English Small Penalties Act of 1865 (of which the Irish Act of 1873 is an exact copy) in regard to Jervis' Act. Further, the Licensing Act of 1872 (35 & 36 Vict. c. 94) by sect. 51, incorporates the provisions of the Petty Sessions Act as to prosecuting offences and recovering and enforcing penalties and forfeitures, subject to certain provisions, the second of which adopts with an important variation the enactments of sect. 22, sub-sections 2 and 3 of the Petty Sessions Act, by providing:—"Where the Court of summary jurisdiction orders that a distress shall be made in default of payment of any *penal sum* exceeding £5, *including under that expression costs actually adjudged in respect of an offence*, the Court may order that in default of the said sum being paid as directed, the person liable to pay the same shall be imprisoned for any term not exceeding the period specified in the following scale"—the scale given being the same as was provided in the Petty Sessions Act. This shows that the intention of the legislature, at least since 1865, has been to treat the "penalty" as the sum of the fine and of the costs combined. Thus, in this case the penalty was £5 2*s*. 6*d*., and the Act of 1873 was inapplicable; the order of conviction therefore is bad as not providing (as required by the Petty Sessions Act) for distress in the first instance.

[*Molloy, Q.C.*, as *amicus curiæ*, referred the Court to the opinion given in 1865 by the English Law Officers in regard to the identical provisions of the English Small Penalties Act of that year (28 & 29 Vict. c. 127), and reported in *The Law Times*, vol. 40, p. 556. At the suggestion of Mr. George Oke the question was submitted, through the Home Secretary, to the Attorney-General and the Solicitor-General (Sir Roundell Palmer and Sir R. P. Collier)—"Whether the word 'penalty' (in the Act of 1865) includes or excludes the costs incurred in its recovery (see sects. 3 and 6), as, for example, if a person is fined £5 and costs, is the case within the statute?" The answer was—"Though the wording of the Act on this subject is not quite satisfactory, we think that the term 'penalty' must be taken to mean the penal sum adjudged, together with the costs, *i. e.* the aggregate of the penal sum and the costs."]

Keogh, in reply:—

The costs in the case of an acquittal could not be made the subject of an order for imprisonment; and, in the case of a conviction, the Justices, by imposing costs, might be in a position to inflict a term of imprisonment otherwise entirely beyond their jurisdiction. Thus, in a case where the maximum fine was 40*s.*, the Justices might, by the addition of 6*d.* costs, have jurisdiction to impose a term of two months' imprisonment.

Cur. adv. vult.

June 13.

The judgment of the Court was delivered by—

O'Brien, J.:—

Upon a motion for a *certiorari* to remove a conviction under the licensing law, a question has been raised of much general importance, affecting the daily duty of magistrates, with reference to the power of measuring imprisonment for non-payment of penalties. Magistrates are authorized, in case of penalties under £5, to order imprisonment, in default of payment, for certain specified terms, according to the amount, without previously issuing a warrant of distress, which was the mode of recovery before the Fines and Penalties Act. The question is whether the costs are to be added to the penalty, so that the sum of both is the amount on which the imprisonment is to be measured. In this particular instance, the penalty having touched the limit within which the distress may be dispensed with, if the costs are added the limit is exceeded, and the order is void, so that in that case the power of imprisonment is abridged. But in all other cases, it is admitted, as the necessary effect of a decision in favour of the defendant's view, the power of imprisonment is increased throughout the entire scale, which is a startling result, when we come to consider the intentions of the legislature. For, under this construction, a penalty of ten shillings, to which seven days imprisonment are attached in default of payment, by the addition of the smallest sum for costs becomes more than ten shillings, and subjects the person to a fortnight's imprisonment, and so through all the grades of penalty, with their separate terms, that are set out in the statute, the least excess over the sum awarded carrying the defendant over the whole of the difference in the next higher scale of time, and rendering him liable to double the period of committal. For, be it observed, the times are not stated, as sometimes happens, to be in proportion to the sums, but both, for necessary convenience, are divided off into distinct measures, so that anything beyond the line in one may land the defendant at the full measure of the other. This is a consequence so extraordinary, and so manifestly striking in a state of law which exhibits such jealousy of power over liberty, that one casts about to see if the legislature has really made such a result necessary, and I have come to the conclusion that there are convincing reasons to show it has not.

Under the order with which we have to deal, the defendant was fined £5 with costs, and the usual statutory period of committal. From this order, so common in form, we have to start upon a somewhat extensive review of a controversy—with the history of which Mr. Molloy's information, on a subject that is so usefully elucidated by his labours, has made us acquainted—begun a considerable time ago, and as yet, so far as we are aware, without a judicial determination. The English Small Penalties Act, which is identical with the statute of 1873 in this country, was passed in 1865. Almost immediately afterwards questions of construction were raised on several points, one of them being that now in question, namely, whether the costs were to be added to the amount in measuring the term of imprisonment. On the suggestion of Mr. Oke, the author of the work on Justices, those questions were submitted by the Executive to the law officers of the Crown, then the late Lord Selborne and Sir Robert Collier; and to the question that concerns the point at issue, they gave this answer:—"Though the wording of the Act is not quite satisfactory, we think that the term penalty must be taken to mean the penal sum adjudged, together with the costs, *i.e.* the aggregate of the penal sum and the costs." The volume of the *Law Times*, however, which gives the correspondence and opinion, contains an article, written perhaps with the aid of knowledge of the subject which Mr. Oke himself alone could supply, which says that there is grave doubt of the correctness of the view so stated, and puts several very strong and pertinent arguments to show that the expression "including costs," which was taken to be the ground of the opinion, was intended to meet cases of distinct sums awarded, that would be otherwise wholly unprovided for. In fact, the arguments that were used in the present case on behalf of the defendant, and the answers given to them, are exactly anticipated in nearly every point. And the article even expects that some enterprising criminal would be found to try it out with the law officers by bringing an action against magistrates for illegally mixing up penalty and costs; as it is here contended that they have acted illegally in keeping them distinct. However, the defendant's counsel professes to trace the adoption of the opinion of the law officers of England in subsequent legislation, and considers that he has found evidence in support of that proposition in the Licensing Act of 1872, which provides for sums above £5, after default to recover by distress, and uses the words, "any penal sum exceeding £5, including in that expression costs actually adjudged in respect of *an* offence." Now, these words appear to me not at all to bear out the argument of counsel, but to have been intended exactly to represent the previous language used in the Small Penalties Act of England, and to leave it where it stood. The words are, "costs actually adjudged in respect of *an* offence," which is not the same thing as *the* offence to which the penalty is attached, but a substantial thing distinct from it.

As Mr. Keogh pertinently observed, the Act says the expression shall "include," not that the costs shall be added to the penalty, which would be the direct and obvious mode if it were intended that the imprisonment should be measured upon both. And what are the figures named in the scale under this Act exceeding the sums under the Small Penalties Act? They are £5, £10, £30, and £50. Would anybody suppose that these large sums were compounded of the penalty, and the trifling sums awarded for costs by Petty Sessions, 2*s.* 6*d.* for example; which would come to this, that £50 meant really not that, but £49 17*s.* 6*d.* and 2*s.* 6*d.* costs. Further, as this is a provision for enforcing the penalty, after an unsuccessful distress, it falls under the 22nd sect. of the Petty Sessions Act, which makes the imprisonment determinable upon the payment of the penalty and the costs, and the costs of the distress where same shall have been made, which latter costs did not therefore exist, and could not have been included in the amount on which the committal was measured at the time the order was made. This same phrase on which Mr. Harney relies will be found to have been carried exactly into the English Summary Jurisdiction Act, which, in the definition clause, sect. 49, says—"The expressions 'sum adjudged to be paid by a conviction' and 'sum adjudged to be paid by an order' respectively include any costs adjudged to be paid by the conviction or order, as the case may be, of which the amount is ascertained by such conviction or order." The English statute, in fixing the amount of the sum or sums that regulate the scale of imprisonment, also employs single and integral figures up to £20, which naturally would not consist in any part of costs. It might occur to one that the word "sum or sums" in the plural was to make room for the inclusion of the costs as under the definition clause. But that construction is quite inconsistent with the provisions of the statute. For by the English Act, as well as already by the Irish Petty Sessions Act, the Court may allow time for the payment of the sum, or may make it payable by instalments, or may take security for it, with or without sureties, all which provisions are quite inapplicable to costs. The real object of costs being mentioned in the Small Penalties Act of this country, and the English statute referred to, is that otherwise costs, ordered to be paid where there was no penalty, or costs adjudged to a successful defendant, or in any case where they are distinct sums, would be wholly unprovided for and could not be recovered in any way, so that there is another subject capable of satisfying the words of the statute. Another English Summary Jurisdiction Act was passed in the year 1884, which is almost entirely conversant with doubts that have been raised upon previous statutes; and there is not the least allusion to this point. Further, Mr. Oke's Magisterial Synopsis has lately been republished, and it does not contain a word on the subject, from which I draw the conclusion that the point first suggested by him, on which the opinion of the English law officers was given, was dropped as wholly untenable. The passage that was cited from Mr. Humphrey's book does not give any support to the argument of Mr. Harney, and Mr. Molloy's treatise, which has become the great text-book of the law of Justices in this country, states the rule as it exists under the Petty Sessions Act, in which, as to the period of imprisonment, the penalty did not cover the costs, without suggesting that any change was made in the law. It is not contended that there is anything in the words of the statute that would *compel* the magistrate to add the costs in measuring the imprisonment. Upon the whole I have come to the conclusion that the objection is wholly unfounded, that it is one of those obsolete and forgotten things at times dug up by the zeal of advocacy, which it is more easy to find than to refute, and therefore that the order should be discharged with costs.

Solicitor for the applicant: *J. J. O'Mahony.*

Solicitor for the Justices: *The Chief Crown Solicitor.*

A. E. R. J.

Q. B. Div.
1895.

Jan. 30.
Feb. 2.
April 25.

PALMER, Appellant; GUARDIANS OF BALROTHERY UNION, Respondents (1).

Representation of the People Act, 1884 (48 *Vict. c.* 3), *sect.* 9 (3)—*Parliamentary Registration (Ireland) Act,* 1885 (48 *Vict. c.* 17), *sect.* 3, *Sch. I., Form No.* 34—*Form of Requisition—Description of Property "according to the Rate-book"—Service of Form—Summary Jurisdiction—Service of Summons—Defendant appearing, and objecting to sufficiency of service—"Inmate"—Petty Sessions (Ireland) Act,* 1851, *sect.* 12 (3).

By the Representation of the People Act, 1884, c. 3, sect. 9 (3), and the Parliamentary Registration (Ireland) Act, 1885, c. 17, sect. 3, and Schedule I., Form No. 34, a Form of Requisition may be served "on the person who is the occupier, or rated, or liable to be rated," in respect of any hereditament comprising any dwelling-house within the meaning of the Representation of the People Acts, "or on some agent of such person concerned in the management of such hereditament," requiring that same be accurately filled up and returned to the Clerk of the Union, under a penalty not exceeding 40*s*. By the Act of 1884 the form may be served in the manner provided in respect to service of notices of non-payment of rates (*i.e.*, under 30 & 31 Vict. c. 102, sect. 28, "delivered to the occupier, or left at his last known place of abode, or with some person on the premises in respect of which the rate is payable.")

The statutory form contains a note directing that a copy thereof shall be served in respect of every separate rating, and that the clerk of the union and the collector of rates are required to fill in column 1 thereof "according to the rate-book" before service.

It also contains this note:—"The description of the property in the first column should be a copy from the rate-book, and should be filled in by the clerk of the union, and if it is a house numbered in a street should specify the street and number." The form contains three columns. Column 1 is headed—"Property in respect of which the person making the return is rated [*or* liable to be rated, *or* occupier];" column 2, "Situation or description of every dwelling-house, as defined by the Representation of the People Acts, forming part of the property in first column;" column 3, "Surname and other name of every man who was on the 20th July last, and has been up to the date of the return, an inhabitant occupier of any dwelling-house in the 2nd column."

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(1) Before Harrison, O'Brien, Johnson, and Gibson, JJ.

Q. B. Div.
1895.

PALMER,
Appellant;
GUARDIANS,
BALROTHERY
UNION,
Respondents.

The appellant P. was owner of numerous rated hereditaments in the town of Rush, and liable to be rated in respect thereof. He had a residence within the county, and had a rent office in the town of Rush.

In 1895, a number of Forms of Requisition were prepared by the clerk in respect of these hereditaments by filling in (above the heading of column 1) the words "No. in rate-book, 597" (or whatever the proper number in each case was) and by filling in, in column 1, the words "Rush. Land." The forms were signed by the clerk and the collector, and were directed to the appellant P. without further address. They were served by delivery at the said rent office in Rush to P.'s estate bailiff, and were subsequently returned, with the words "not known" filled in under the 2nd and 3rd columns, dated, and signed "Francis O'Donnell & Son," P.'s agents.

Summonses were issued against P. for non-compliance with these requisitions, and were served on him by delivery at said rent office to his estate bailiff. When the summonses came on for hearing P.'s solicitor applied for an adjournment, subject to his right to object to the service of the summonses. The Justices, on the adjourned hearing, having convicted the appellant:—

Held, on Case Stated (*diss.* O'Brien, J.), that the decision of the Justices was wrong;

Held, that the service of the summonses was good service; and (*per* Johnson, J.) that the appellant's appearance cured the defect (if any);

Held, that the service of the Forms of Requisition was bad; and,

Per Harrison, Johnson, and Gibson, JJ. (*diss.* O'Brien, J.), that there was no evidence of authority necessarily to be implied, or expressly given to appellant's agents, so as to make the appellant criminally responsible for the insufficiency of the returns which they had made;

Per O'Brien, J. (*diss.*), that, though the service of the forms on the appellant was insufficient, the defect was cured by his agents, with his implied authority (which the Court should infer), making a return thereto.

Per Johnson and O'Brien, JJ., that the description of the property in the 1st column of the forms of requisition was sufficient, and the return inaccurate and insufficient.

CASE STATED by Justices for the opinion of the Queen's Bench Division, pursuant to 20 & 21 Vict. c. 43, at the instance of the defendant, who had been charged at Petty Sessions held at Balbriggan, Co. Dublin, on the 18th September, 1894, on 286 several complaints. These complaints were in the following form:—

"Whereas a Complaint has been made to me that you, being the person rated, or liable to be rated, or being concerned in the management of the hereditament described in the form of Requisition served on you, on the 8th day of May, 1894, pursuant to the Representation of the People Act, 1884, upon which form of Requisition the reference in the rate-book was numbered

597, and same required you to fill up accurately the said form with the particulars specified in columns 2 & 3 thereof, and within twenty-one days after such service to return the same to the Clerk of the Union, Balrothery, Lusk, County Dublin, failed to comply with said requisition contrary to said statute: This is," etc.

The Case Stated was to the following effect:—

When these complaints came on for hearing originally on the 4th day of September, 1894, the solicitor for the defendant applied for an adjournment, on the ground that the summonses had only been served on the 30th day of August, 1894, and that he required the assistance of counsel, and the hearing of the several summonses was adjourned until the 18th day of September, 1894. The solicitor for the prosecution did not oppose the application for an adjournment, and after same was granted and when applying for said adjournment, the solicitor for the defendant stated that he reserved his right to object to the mode of service of the summonses in each case.

At the adjourned hearing counsel for the defendant required the complainants to prove the service of the summons in each case, and it was proved that the summons in each case had been served by delivering the same at the rent office of the defendant, in the town of Rush, to his estate bailiff. It was contended on behalf of the defendant that such service of the summonses was bad, and, on behalf of the complainants, that, by appearing on the 4th day of September, 1894, and applying for an adjournment, the defendant had waived his right to object to the service of the said summonses, and could not now raise the said question of service, the appearance of the defendant having cured all defects of service. The Justices were of opinion that the service of the summonses need not be proved at an adjourned hearing, and further found, as a fact, that the said summonses were duly served by delivering the same at the rent office of the defendant, in the town of Rush, to his bailiff, who also acted as clerk in said rent office, where the business of the estate of the defendant, as well as his usual course of business, was transacted, and they proceeded accordingly with the hearing.

At the hearing of each of the said complaints it was proved on part of the complainants that the defendant was the person rated in respect of the hereditaments mentioned in the form of requisition mentioned in the complaint, and that such form of requisition, directed to the defendant, was on the 8th day of May, 1894, served by delivering the same at the rent office of the defendant, situate as aforesaid in the town of Rush, in the county of Dublin, to the bailiff of the estate.

It was further proved, on behalf of the complainants, that the forms of requisition so served were returned by Messrs. Francis O'Donnell & Son, of Ellison-street, Castlebar, Co Mayo, agents of the defendant, signed by them, to the Clerk of the said Union, filled up by inserting the words "not known" in columns 2 and 3 of the form of requisition in each ease.

It was proved on behalf of the defendant that the defendant had a residence or place of abode at Kenure Park, near Rush, in the county of Dublin; and it was contended on his behalf that such service of the forms of requisition was bad service upon him, and that the same ought to have been served in the manner provided by the Representation of the People Acts with respect to the service on occupiers of notice of non-payment of rates, viz.—by delivering the same to the defendant or leaving the same at his last or usual place of abode (30 & 31 Vict. c. 102, sect. 28). It was further contended that the agent, as the person on whom such form of requisition was served, and not the defendant, was liable on summary conviction to the penalties mentioned in 48 Vict. c. 3, sect. 9, sub-sect. 3.

On the part of the complainants it was contended that, the defendant having returned the forms through his agent insufficiently filled up, proof of service of the forms was immaterial, as the offence was sending back forms untruly filled up.

The majority of the Bench were of opinion, as a matter of fact, that the forms of requisition had not been accurately filled up, that the service of the forms of requisition was good service, and that the forms were duly returned by the agent on behalf of the defendant, incorrectly and insufficiently filled; and held that the defendant was liable on summary conviction to the penalty mentioned in 48 Vict. c. 3, sect. 9, sub-sect. 3; and made their order accordingly, imposing a fine of 1*s.*, and 1*s.* 6*d.* costs, in each case—the question submitted for the opinion of the Court being whether the said Justices were correct in point of law in their determination as aforesaid, and what should be done in the premises.

The following is a copy of the printed form of requisition served in this case:—The words, "No. in the rate-book 597," and (in column 1) the words "Rush. Land," being filled in by the clerk; and the words "not known" in columns 2 and 3, and the date, and signature, "Francis O'Donnell & Son," being filled in by the persons making the return:—

FORM OF REQUISITION, NO. 1.

597. BALROTHERY UNION. No. 1.

48 Vict. c. 3, Third Schedule; 48 Vict. c. 17, Sch. 1, Form No. 34.

Form of Requisition by the Clerk to the Board of Guardians of every Union, requiring names of Inhabitant Occupiers.

To Lusk Electoral Division.

Right Hon. Sir Roger Palmer, Bart.

You are hereby required to fill up accurately the under-written Form. If this form is not returned to me accurately filled up within twenty-one days after the service hereof, you will be liable under the "Representation of the People" Act, 1884, to a penalty not exceeding Forty Shillings.

Dated this day of 189

JAMES STACK, *Clerk of Union.*
WILLIAM TOLAN, *Collector.*

No. in rate-book, *597*. Recd. May 15th, 1894.

1 Property in respect of which the person making the Return is rated (or liable to be rated, or occupier).	2 Situation or description of every Dwelling-house, as defined by the Representation of the People Acts, forming part of the property in first column.	3 Surname and other name of every man who was on the Twentieth day of July last, and has been up to the date of the Return, an Inhabitant occupier of any Dwelling-house in the second column.
Rush. Land.	*Not known.*	*Not known.*

I declare that the above is a true and complete return.

Dated this *12th* day of *May, 1894*.

(Signed), FRANCIS O'DONNELL & SON.

Palmer,
Appellant;
Guardians,
Balrothery
Union,
Respondents.

[Note.—A copy of this Form shall be served in respect of every separate rating, and the Clerk to the Board of Guardians, and the respective Collector or Collectors of Poor Rates are required to fill in Column No. 1 according to the rate-book before the Form is served. When a form has been mislaid or spoiled, or erroneously filled up, another form shall be supplied by the Clerk to the Board of Guardians, or the Rate Collector, on application by or on behalf of the person required to fill up the Form.

The form when returned through the Post is to be received and duly dealt with by the Clerk and all other Officials even though the postage be not prepaid.]

Dated the day of 18

(Signed),

Note.—The description of the property in the first column should be a copy from the rate-book, and should be filled in by the Clerk of the Union, and if it is a house numbered in a street, should specify the street and number.

J. H. Campbell, Q.C., for the appellant, opened the case in the absence of *S. L. Brown.*

Clancy and *O'Shaughnessy, Q.C.*, for the respondents.

S. L. Brown, in reply.

The matters in argument appear fully from the judgments.

Cur. adv. vult.

O'Brien, J.:—

April 25.

The Representation of the People Act of 1884, in providing a machinery for putting persons upon the list of voters, requires under a penalty certain returns to be made to the Guardians of Unions, and the Registration Ireland Act gives a form of return numbered 34, which is substituted, by section 3, for those under the previous Act, with some differences, the minute discussion of which however would not assist our decision. The form contains three headings, in separate columns, the first "property in respect of which the person making the return is rated (or liable to be rated, or occupier)" the two latter conditions being left out in this case, because Sir Roger Palmer is in fact rated, and is the immediate lessor. Let us stop for the present upon this form, on which so much discussion turned. There is subjoined to the form, and before the place for the signature of the person making the return, what is called a note, which says that a copy of the form shall be served in respect of every separate rating, as has been done in this instance, and then come the important words "and the clerk to the Board of Guardians and the respective collector and collectors of poor rates are required to fill in column No. 1, before the form is served." There is a second "note" following the place for signature, which says the description of the property in the first column should be a copy from the rate-book, and should be filled in by the clerk of the Union (the immediately preceding note having added the collector), and if it is a house numbered in a street should specify the street and number. This is followed by instructions which "shall be annexed" to the form with variations which are expressly discretionary, the terms of the direction agreeing in the distinction drawn by Mr. Justice Johnson between the imperative and potential mood, and in some of which instructions the particulars are of such a nature as to identify the premises, which it is contended the clerk should do for the owner. Now anyone seeing that the description should be a copy of the rate-book, and going to the rate-book would find a column, headed "description of the premises," and would certainly conclude that that was what was to be put into the form. The whole of what is comprised in the several columns of the rate-book certainly could not be put into the first column of the form. That, however, is headed "property in respect of which the person is rated," and while the column in the rate-book is not less a description of the property in respect of which the person is rated, because it applies to other property of the same kind, in respect of which also he is rated, it is certain it does not specifically identify it, and the object of the statute therefore would appear to require that description in the note must mean something further than description in the rate-book; and it was the conviction that the latter, though appearing only to be required, would not meet its object, that probably first led to the addition of the number in the rate-book, such as is contained in the present case. Some observation was made upon the place where the number appears, as, namely, being above the line which separates the rest of the description; but it is not less strictly in the first column because it is at the head of the column instead of elsewhere, for the column goes up as well as down, and the distinction rather reminds us of the contumely that some other refinements of the same kind have brought upon the law.

Now the number in the rate-book appears to furnish the most certain means of identifying the subject of the rate. I believe the usual receipt for rates is headed with the number in the rate-book, and if, as was observed, the rates of all the holdings are paid together in one sum, the owner has the right to have them distributed, and to have the particulars of the valuation in each case. It is difficult to see what other particulars could be given from the rate-book or would be appropriate to the term "description," or would specifically distinguish it from other holdings. The extent of land is not a necessary part of the description; and in the rate-book of the union several of the holdings have no acreage given. Even the valuation is an incident of property, not properly a description. The situation "Rush" is given and alike applicable to all; while the name of the occupier could not be required, and would lead to confusion, as there may be no actual occupier, and the object is to return the future one for the purpose of the franchise. No practical difficulty can arise, for, as the forms are applicable to all the holdings alike, the owner has but to fill up any one form for each tenant. I am therefore of opinion, upon the principal question which was argued, though not expressly stated in the case, that the requisition that has been served is a legal compliance with the statute.

With respect to the service of the requisition, it is clear that the mode prescribed by the statute by reference to the service of a notice for rates—that of service on the party personally or at his abode—was not adopted in the first instance. But I consider the case is the same as if the defendant had been served personally, if the agent acted upon it and actually made a return, so that no other person could afterwards use the form, and if we come to the conclusion, which we are at liberty to do, that he had authority to act for the owner in the matter.

The service of the summons was also objected to. That was effected by leaving the summons at the rent office of the defendant, where it is found that the business of his estate, as well as his other usual business, is carried on with a bailiff, who acts as clerk in the office. The mode of service of summons of civil bills and of process in the superior Courts are all different, and furnish no common principle to which they can be referred. Under Jervis's

Act, which preceded our system of summary jurisdiction, the service was required to be by delivery to the defendant personally, or by leaving the same with some person for him, at his last, or most usual, place of abode. The Petty Sessions (Ireland) Act enlarged the mode of service in a somewhat clumsy manner, by requiring it to be by delivering the copy to the party, or, if he could not conveniently be had, by leaving it at his last, or most usual, place of abode, or at his office, warehouse, counting-house, shop, factory, or place of business, with some inmate of the house." It would seem as if the term *inmate* were originally intended to apply to a person in a residence or abode, and permanently to be found there, which is certainly its natural meaning; and afterwards when "warehouse, counting-house, or office" were added, it was left standing, because the service must be on some person, and as, therefore, under the words service at an office, service could not be made without the document being left with some one, the term *inmate*, of necessity, must bend from its usual meaning to a less proper one, otherwise there could be no service at several of the places named. And therefore I would take it to be certain that the bailiff in this instance was an inmate for the purpose of the service.

Another practical point of frequent occurrence remains, whether the application for an adjournment on behalf of the defendant was inconsistent legally with any right remaining to object to the service. It is certain that in the Civil Bill Court objections to the mode of service are admitted, though the party actually appears; but according to my recollection this rests upon some express words of the statute. Otherwise it would seem to be absurd that a person could be in Court, and not in Court at the same time. However, in this view, the question is not confined to the case of an application for an adjournment, but applies to the right of a party who has appeared to object to the service even in the first instance. I would not like to lay down a rule which might subject a person to the consequences of a conviction who had ground to object to the service, and was determined to stand upon it by not appearing at all. But my impression is that the principle is against the right of a person who has appeared to object to the service that has brought him into Court.

Upon the whole I am of opinion that the defendant has not shown any sufficient reason to excuse him from the penalty for not complying with a requirement which the Legislature has deemed to be necessary for carrying out the machinery of civil government, even if an oppressive use were capable of being made of this new mode of turning the owner of property into an election agent or returning officer.

JOHNSON, J.:—

It appears to me that there are four questions to be decided in this case. First, were the Justices right in overruling the objection for the defendant that the summons to Petty Sessions was not well served. The defendant appeared by a solicitor who applied for and was granted an adjournment of the hearing to enable him to instruct counsel, and who at the same time reserved "his right to object to the mode of service" of the summons. At the adjourned hearing counsel appeared for the defendant and required service of the summons to be proved. I think the service which was proved complied with the provisions of the Petty Sessions Act, 1851, sect. 12, sub-sect. 3; but, even if it did not, under sect. 9, sub-sect. 1, the appearance of a defendant by counsel or solicitor is sufficient. Section 11, sub-sect. 2, is I think directory, except in those cases in which the statute creating the offence makes service of a summons imperative to found jurisdiction, as in *Dixon* v. *Wells* (1). Inasmuch then as the defendant (as I must take it in this case) appeared before the Justices by counsel and solicitor, who were made acquainted with the complaint preferred against their client (the defendant), and acted for the defendant on the hearing of that complaint, it follows in my opinion from the decisions cited at the bar (2), and the observations on these cases by Lord Coleridge, C.J., in *Dixon* v. *Wells* (3), that the Justices had jurisdiction to enter on and hear and determine the complaint, even though no proof was given of service of a summons pursuant to the provisions of the Petty Sessions Act, 1851, and therefore I think the Justices were right in their decision on these questions.

(1) 25 Q. B. D. 249.

(2) *R.* v. *Shaw*, 10 Cox C. C. 16; *Reg.* v. *Hughes*, 4 Q. B. D. 614.

(3) 25 Q. B. D. at p. 256.

Q. B. Div.
1895.

PALMER,
Appellant;
GUARDIANS,
BALROTHERY
UNION,
Respondents.

Johnson, J.

2. The next question is,—Did the Form of Requisition (of which a copy is set out in the schedule to the case) comply with the statutory requirements? This point does not appear to have been discussed before the Justices; but it arises on the facts stated in the case, it has been argued here, and therefore is to be decided: *Kavanagh* v. *Glorney* (1); *Knight* v. *Halliwell* (2).

It is contended for the defendant that the description, in column 1, of the property in respect of which the return is required, is so vague and indefinite that it could not be reasonably identified, and therefore that no other return than "not known" could be made to columns 2 and 3. The 48 Vict. c. 17 (Schedule 1, Form No. 34) contains clear and precise instructions for filling up the Form of Requisition; before it is served, column 1 is to be filled in by the Clerk of the Union "according to the rate-book," and "the description of the property in the first column should be a copy from the rate-book." During the argument it was pointed out that the heading of column 1 in the Form is not accurate for all purposes, being limited to "property in respect of which the person making the return is rated (or liable to be rated or occupier)," while the 48 Vict. c. 3, sect. 9, sub-sect. 3, provides that such person "or some agent of such person concerned in the management of such property" may be served with and required to make the return to the requisition. I think, however, that the substance and meaning of the enactment is that the property in respect of which the return is required must be described in column 1, by the Clerk of the Union by copying into that column so much from the rate-book as is reasonably necessary and sufficient to indicate to the person required to make the return (whether principal or agent) the particular hereditament in respect of which the return is required. Regard must be had to all that is contained in the Form of Requisition in the present case, and it states on its face, "*No. in rate-book, 597,*" and, in col. 1, "*Rush,*" "*Land.*" The case finds as a fact that the defendant is "the person rated for this hereditament," and, whether or not, he had previously paid rates for it; and, without attempting to lay down what in every case and under all circumstances may be sufficient, in my opinion the Form of

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(1) Ir. R. 10 C. L. 210.

(2) L. R. 9 Q. B. 112.

Requisition in the present case contained a copy of as much of the rate-book as was reasonably necessary and sufficient to indicate the particular hereditament to the person (the defendant) required to make the return in respect of it; and I therefore think that the words "not known" at foot of columns 2 and 3, would not have been a compliance with the requirements of the statute as a return by the defendant (to whom the requisition was addressed), and would have been an illusory, insufficient, and incomplete return, if the defendant had been (and in my opinion he was not) served with the requisition.

3. The next question is, were the Justices right in deciding that the service of the Form of Requisition was good service? It was not personally served; but under the 48 Vict. c. 3, sect. 9, sub-sect. 4, this form "may be served in manner provided . . . with respect to the service of notice of non-payment of rates" (under 30 & 31 Vict. c. 102, s. 28)—viz. "the notice shall be deemed to be duly given if delivered to the occupier or left at his last known place of abode or with some person on the premises in respect of which the rate is payable." The form of requisition in the present case is addressed to the defendant; he is the person required to make the return to it; it was not so served nor was it proved that it ever reached the defendant, or that he was cognizant of it or of what purports to be the return made to it. I am therefore of opinion that the decision of the Justices that the defendant was served with the form of requisition was not right.

4. The remaining question is, were the Justices right in law, in holding the defendant (who in my opinion for the reasons I have stated was not served with the Form of Requisition) liable for the present return which is made by "Francis O'Donnell & Son," to whom it is not addressed and who were not required to make any return. The case states, "Messrs. Francis O'Donnell & Son, of Ellison-street, Castlebar, county Mayo, are the defendant's agents." Who the individuals constituting the firm may be does not appear; nor is the character or nature of their agency stated, although during the argument, the firm has been spoken of as defendant's land agents. The case also finds—"It was proved that the Form of Requisition signed by said agents was returned by said agents to the Clerk of the said Union filled up 'not known,'" in columns 2

and 3, of the Form of Requisition. According to the copy set out in the schedule to the case the Form of Requisition was addressed to "Sir Roger Palmer, Bart.," and not to "Francis O'Donnell & Son" or to any agent. The return is, "I declare that the above is a true and complete return. Dated this 12th day of May, 1894, Francis O'Donnell & Son." This declaration purports to be made by an individual; it is signed in the name of a firm, but it does not purport to be on behalf of the defendant to whom it was addressed. The case states that the defendant had a residence or place of abode at Kenure Park, Rush. Whether he had any other residence in Ireland, or elsewhere does not now appear; but the case does not state or find that Kenure Park was the last or usual place of abode of the defendant when the requisition was left at his rent office in Rush, or that the defendant was at Kenure Park at that time or afterwards, or was at any time cognizant of the requisition, or that Francis O'Donnell & Son, or any member of that firm had express authority—nor does it appear from the facts found that that firm or any member of it had any implied authority—to make the return for which these proceedings were instituted before the Justices, or any return whatever, or that defendant was ever cognizant of this insufficient return made by "Francis O'Donnell & Son."

In general a principal is not criminally answerable for the act of an agent. In *Wilson* v. *Rankin* (1)—affirmed in the Exchequer Chamber and followed in *Dudgeon* v. *Pembroke* (2)—Cockburn, C.J., says: "It is a well-established distinction that, while a man is civilly responsible for the acts of his agent, when acting within the established limits of his authority, he will not be criminally responsible for such acts, unless express authority be shown, or the authority is necessarily to be implied from the nature of the employment, as in the case of a bookseller held liable for the sale by his shopman of a libellous publication. Under ordinary circumstances the authority of the agent is limited to that which is lawful. If in seeking to carry out the purpose of his employment he oversteps the law, he outruns his authority, and his principal will not be bound by what he does." I therefore think

(1) 6 B & S. 208, 216; L. R. 1 Q. B. 162 (S. C.)

(2) L. R. 9 Q. B. 581; (affirmed 2 App. Cas. 284).

that the defendant cannot in the circumstances of this case be held criminally answerable for what does not appear to be other than the unauthorised act of "Francis O'Donnell & Son"; and for these reasons I think that the Justices were not right in law in convicting the defendant.

Gibson, J.:—

This case is of general importance, and as there is no authority upon the construction of the statutes discussed in argument, the Court thought it right to reserve judgment.

Upon one point there is no doubt, namely that the objection to the sufficiency of the service of the summons fails without any reference to *Reg.* v. *Hughes* (1), as to the application of which I express no opinion. The other points raised involve more difficulty.

Under 48 Vict. c. 3, sect. 9, sub-sect. 3, the overseers "may serve on the person who is occupier, or rated, or liable to be rated, in respect of such hereditament, the requisition specified in the third schedule" to the Act; "and if any such person or agent, on whom such requisition is served, fails to comply therewith, he shall be liable, on summary conviction, to a fine not exceeding 40*s*." Sub-section 4 prescribes the mode of service of the requisition. Admittedly the prescribed manner of service (which must be on the occupier, or at his last, or usual, place of abode, or on some person in the premises rated) has not here been followed, but it is argued that any mode of service is sufficient, if only the notice is brought to the personal knowledge of the party intended to be served. The form of requisition given in the third schedule is addressed to a specified person, E. F., who is himself to make the return; but the title of the first column in the notice is "Property in respect of which the person making the return is rated (or liable to be rated or occupier)." This title, it will be seen, omits any reference to agent; and Mr. Campbell argues, therefore, that the penalty imposed by sect. 9, sub-sect. 3, on an agent may be incurred by the agent in respect of a notice, which, though in terms addressed to the person rated, is served on, and intended to be complied with by, the agent so served. He contends that the default was the agent's, and that for such default the defendant is not criminally responsible.

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(1) 4 Q. B. D. 614.

In my opinion this is not so. The requisition contemplated by the statute (as the section and form show) must be addressed to the person who is to comply with it. The notice before us was directed to Sir R. Palmer, and, so far as I can see, was intended to be served on him, and not on his agents, Francis O'Donnell & Son, of Castlebar, whoever the members of the firm were. If anyone is liable it must be Sir R. Palmer, and not the agent. The only argument against this is that founded on the heading of column 1 in the requisition, but it is more likely that this is inaccurate by omission than that the form of requisition is incorrect in the vital particular, that it inaccurately purports to direct it to be complied with by the person to whom it is directed, instead of requiring such compliance to be by the person served, who is meant to comply with it.

The next question that arises is, Was the service actually effected sufficient to impose on the defendant liability to the statutory penalty? The service was on the 8th May, 1894, at the defendant's rent office, in Rush, by delivery of the notices to the bailiff of the estate. The notice had to be filled in within twenty-one days after service, if the service was good. In the present case, when did the twenty-one days begin to run? The Justices apparently held that this service was good, but before this Court it was conceded that the mode of service provided by the statute had not been followed. It was argued for the prosecution that the action by the agents in filling up the return—action which had not been disavowed by Sir R. Palmer—established constructive service, binding defendant, and making it proper to infer knowledge of the requisition on his part.

No authority was cited for this in a criminal case. The statutory offence is committed if, within twenty-one days after service, the requisition is not complied with. It would be inconvenient that the starting point of the twenty-one days should be left to inference and speculation, where for some reason the prosecutors chose not to follow the statutory mode of service. But whether knowledge and notice, as distinct from service of the requisition, would be sufficient or not, in my opinion the agents were not entitled to fill in the requisition addressed to the defendant, and substitute themselves as signatories, and we cannot infer authority by the defendant for their unlawful act: *Kinsella* v. *Hamilton* (1); *Barry* v. *Dublin Tramways* (2). They probably did so under a mistaken belief that, as Mr. Campbell argued, being agents they were bound to make the return. Of course if they were so bound, defendant would not be responsible criminally for their default. As they were not so bound, I cannot see that their action establishes service on the defendant, without at least express evidence, of which there is none, that he directed them to make the return. To make and sign in their own names this return was not within the apparent scope of a land agent's authority. If I were at liberty to speculate, I would say that the bailiff sent on the notice to the agents, and that the agents, thinking they were under statutory obligation to do so, filled in the return. There is no evidence that the defendant was at home, or even in Ireland, at the time. If knowledge of the requisition by defendant, and authority from him to the agents to make the return were essential, the *onus* of giving clear evidence on the subject lay on the prosecutors, who have brought the difficulty on themselves by departing from the statutory procedure. As a general rule a man is not liable criminally for the act of his employee: *Hardcastle* v. *Bielby* (3).

To avoid misconception, I wish to add that the person to whom the requisition is addressed, if he is a person coming within the class on whom the statute imposes the duty of compliance—at least if not prevented by something making such compliance impossible, such as lunacy, absence, etc.—is obliged himself to make the return, and cannot escape liability by delegating the duty of complying with the statute to an agent. If the defendant had been served with a sufficient requisition, he could not be allowed to say that the default was his delegate's, and not his.

I wish also to add that signature in a firm name is improper where the requisition is addressed to individuals, as it ought to be.

The last question raised was that the requisition was not in the prescribed form, and that the penalty could not attach. The point could hardly arise under 48 Vict. c. 3, as there were no notes and instructions attached to the form in that statute, and the prescribed requisition had to be filled in throughout by the person served. The difficulty depends on the special notes and instructions appended to Form 34 in the 1st schedule to the Act 48 Vict. c. 17, which (by sect. 3 of that enactment) is substituted for the form in the earlier statute, with a power to the Lord Lieutenant to amend and alter the forms. The corresponding English section, 48 Vict. c. 15, sect. 18, contains the important provision that a disregard of any form or instruction shall not of itself invalidate any notice or other thing. It was conceded that the statutory notes and instructions were mandatory, and that substantial violation of their provisions might vitiate the statutory notice. The first note, which is not in the corresponding English schedule, directs a copy of the requisition to be served in respect of every separate rating, and the clerk and respective collectors are required to fill in column 1, according to the rate-book, before service. The second note, which is found in the English schedule, prescribes that the description of the property in the first column should be a copy from the rate-book, and should be filled in by the clerk, and, if it is a house numbered in a street, should specify the street and number. It is plain that the clerk is not, in a case like the present, to go outside the rate-book. His duty is performed if column No. 1 is filled in according to the rate-book, and if the description of the property in that column is a copy from the rate-book. The "description of the property" here spoken of is not the same, I think, as the description in the column in the rate-book, where there is a heading, "Description of property rated." In the rate-book "description" only refers to the species of the property rated, such as land, buildings, house, etc. In the note in the Act of 1885 it means description for the purpose of identification. How much of the rate-book must be transcribed? So much, I think, as is reasonably necessary to supply a description. I doubt whether a reference to the number in the rate-book would cure the requisition if otherwise insufficient, as it only sends the person rated to the rate-book to identify, whereas the requisition ought to give a copy of the description in the rate-book.

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(1) 26 L. R. Ir. 671.

(2) 26 L. R. Ir. 150.

(3) [1892] 1 Q. B. 709.

No objection on the head of the insufficiency of the notice was taken before the Justices, and we cannot now assume that Sir R. Palmer was embarrassed or misled. The point seems to me one of some difficulty, and as it is not necessary to decide, I prefer to express no final opinion whether the notice is sufficient in point of law, or whether, if it might be insufficient, the defect might not be aided by a finding that the defendant was not embarrassed or misled, or whether non-compliance with the note is of itself sufficient to vitiate the requisition.

I am of opinion that the defendant was not rightly convicted.

Mr. Justice Harrison, who cannot be here to day, concurs in the conclusion arrived at by the majority of the Court.

Solicitor for the appellant: *Wm. Smyth.*

Solicitor for the respondents: *Christopher Friery.*

A. E. R. J.

REG. (GIANT'S CAUSEWAY, &c., TRAMWAY COMPANY) *v.* JUSTICES OF CO. ANTRIM (1).

Q. B. Div.
1895.
May 16, 17.
June 13.

Certiorari—*Dismiss by Justices*—Nemo bis vexari debet pro eadem causa—"*Want and excess of jurisdiction*"—*Bias or interest of Justice adjudicating—Acquiescence—Application by a Judge of his local or scientific knowledge*—Onus *of disproving statutory exceptions* (40 *&* 41 *Vict. c.* 56, *sect.* 78).

L. was prosecuted, *in absentia*, before Justices, on a complaint alleging generally that he was on the complainants' railway on a certain date, after having once received warning, contrary to 31 *&* 32 Vict. c. 119, sect. 23, as amended by 34 *&* 35 Vict. c. 78, sect. 14. The complaint did not negative the statutory exception in the case of a person being on a railway "for the purpose of crossing the same at any authorised crossing." The trespass actually occurred on a point where the line ran along a lane, which had, at one time, been a public right of way. M., one of the presiding Justices, had an interest in this right of way as a member of the public living in the vicinity; and, some time previously to the prosecution, had been in communication with the complainant Company in regard thereto; they asserting that the right had been lost, as it had not been preserved by the award of the arbitrator under the Board of Trade, appointed to adjust all such claims against the said Company; M. considering that the right still existed as before, inasmuch as

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(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN, JOHNSON, and HOLMES, JJ.

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1895.

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no alternative way had been provided, and having challenged the Company to institute proceedings against him for trespass in assertion of the right. At the Petty Sessions Court, before this and some other cases in which the complainant Company were interested were called on, a director of the Company asked M. to remain and adjudicate; and no objection was afterwards taken during the hearing, when the question of the existence of the right arose. During the hearing of the case the complainants' witness having stated where the trespass occurred, M. asked: "Surely that is on the track of the old lane. Is there not a public right of way there?" The witness did not answer, and the complainants' solicitor refused to make any admission, submitting that the defendant was not present, and that no question of such right was raised on his behalf. The defendant, L., a decrepit mendicant, had already, on the same day, been sentenced to fourteen days' hard labour for begging, and had also been fined 2*s.* 6*d.*, at the suit of the Company, for trespass. The complainants gave evidence that the defendant had "received warning," but none negativing the statutory exception mentioned above. When the complainants' case had closed the Justices dismissed the summons on the ground that the case had not been proved.

On motion to make absolute a conditional order for a writ of *certiorari* to remove and quash the order of the Justices upon the ground that it was made without, and in excess of, jurisdiction:

Held (*diss.* Holmes, J.), that in no case can *certiorari* issue to remove and quash an order of dismissal by Justices.

Per Curiam, that where it is intended to rely on the bias or interest of a particular Justice as vitiating the proceedings at Petty Sessions, the established and proper practice of the Court is that such bias or interest should be specifically stated as a ground on the face of the conditional order.

Per Sir P. O'Brien, C.J., O'Brien and Johnson, JJ., that (treating the ground of bias as open on this motion), though M. took such an interest, albeit on public grounds, in the case, as to make a real bias reasonably probable, the complainants, by their acquiescence in his sitting and adjudicating on the case, were precluded from relying on this objection.

Per Holmes, J., that the circumstances disclosed no bias sufficient to disqualify M. from adjudicating on the case.

Quære: The Petty Sessions (Ireland) Act, 1851, sect. 20, sub-sect. 1, providing that if an information or complaint shall negative any exception in the statute on which same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant may prove the affirmative thereof; and the County Officers and Courts (Ireland) Act, 1877, sect. 78, providing that such exception may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived, no proof in relation thereto shall be required from the complainant,—is it incumbent on the complainant, where the complaint does not specify or negative the exemption, to prove the negative thereof?

The limits of the right and duty of a judge to use and apply his local or scientific knowledge in reference to a case at hearing before him discussed.

Q. B. Div.
1895.

THE QUEEN
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JUSTICES OF
ANTRIM.

CERTIORARI.

This was an application on behalf of the Giant's Causeway and Portrush, &c., Tramway Company, to make absolute a conditional order, dated the 30th November, 1894, to remove and quash an order of the Justices of county Antrim, made at Bushmills Petty Sessions on the 13th September, 1894, on the ground that it was made " without and in excess of jurisdiction."

The affidavit of W. A. Traill, managing director and engineer of the Company, on which the conditional order was obtained, stated that at these Petty Sessions, before Lord Macnaghten, William Orr, R.M., Captain Robinson, A. H. Steen, and J. Boyle, Justices of the Peace, two summonses for trespass against a man called Love came on for hearing in the ordinary course; that the first summons was for three acts of trespass on the 1st and 15th July, and 20th August, on certain ground, the property of the plaintiffs and adjoining their line of railway, contrary to 31 & 32 Vict. c. 119, sect. 23, as amended by 34 & 35 Vict. c. 78, section 14 (1). It stated that he (W. A. Traill), was examined as a witness for the plaintiffs and proved that the ground in question was the property of the plaintiffs, having been purchased by them under their compulsory powers at the time of the construction of the line; that he also proved that he had warned the defendant personally, prior to the acts of trespass complained of, against trespassing; that the defendant did not appear and was not professionally represented; and that after due proof of the service of the summons the Justices convicted the defendant and fined him in the sum of 2*s*. 6*d*. The affidavit proceeded.—(*Paragraph* 4.) "The second summons (1), was then entered upon before the same Justices complaining of a trespass on certain ground the property of the plaintiffs which, as in the former case, adjoined the plaintiffs' line. I (W. A. Traill) was again examined as witness for the plaintiffs and proved the warning given to the defendant; I also proved the trespass by him on the ground in question, and that it was in the exclusive possession of the plaintiffs, and was purchased by them under their compulsory powers at the time of the construction of the line. The defendant did not appear and was not professionally represented. Due proof of the service of the summons upon him was given, and no evidence of any sort or kind was given or tendered on his behalf, or any question of title raised by him or on his behalf. When the case for the plaintiffs had closed, Lord Macnaghten, who was acting as Chairman of the presiding Justices, stated from the Bench that he believed that there was a public right of way along this particular ground in question, and that the defendant had gone there in the exercise of this right and that the Bench would dismiss the summons on the merits. From this decision the resident magistrate, Mr. Orr, dissented."—*Paragraph* 5 stated that the plaintiffs appealed to Quarter Sessions, where it was held that there was no jurisdiction to hear an appeal from a "D.O.M." The affidavit then proceeded:—(*Paragraph* 6), "The plaintiffs have been advised that this decision of the Justices, if allowed to stand, may seriously prejudice the rights of the plaintiffs as the owners of the ground in question. Lord Macnaghten, who is the owner of property in the vicinity, had himself on several occasions prior to the hearing of this summons trespassed on the ground in question in the assertion by him of what he alleged was a public right of way, but had been warned by the plaintiffs to desist as the ground was their property and as the alleged right had no existence in law or in fact."

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(1) The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), sect. 23, provides:—"If any person shall be or pass upon any railway, except for the purpose of crossing the same at any authorised crossing, after having received warning by the Company which works such railway, or by any of their agents or servants, not to go or pass thereon, every person so offending shall forfeit and pay a sum not exceeding forty shillings for every such offence."

The Railways Regulation (Amendment) Act, 1871 (34 & 35 Vict. c. 78) sect. 14, provides that section 23 of " The Regulation of Railways Act, 1868," shall have effect, as if the words "after having once received warning" were substituted therein for the words " after having received warning."

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(1) The second complaint charged generally "that the defendant, at Bushfoot, in Co. Antrim, on the 20th August, did then and there be on complainants' railway, between Bushmills and the Giant's Causeway, after having once received warning." The first complaint was similarly framed. Neither negatived the statutory exception, "except for the purpose of crossing the same at any authorised crossing."

Lord Macnaghten, in an affidavit filed by him, as cause against making absolute the conditional order, after referring to the proceedings on the motion for that order, and to the affidavit of W. A. Traill (1) stated :—(*Paragraph* 7), that between Portrush and Bushmills the Company's tram line was carried along the county road under a special Act obtained in 1880, and that in 1885 the Company obtained another Act empowering them to make an extension of their tram line to the Giant's Causeway and to take land for that purpose, in which last-mentioned Act the Railway Clauses Consolidation Act, 1845, was incorporated ;—(*Paragraph* 8), that at the time when the Act of 1885 was passed there was an old lane leading from a place on the Bushmills and Port Ballintrae county road called Portcatt, by a collection of houses called Bushfoot, to the sea near the mouth of the river Bush ;—(*Paragraph* 9), that this old lane was, in 1885, and had been previously for a period extending beyond the memory of any living person, a public highway ;—(*Paragraph* 10), that in making their extension to the Giant's Causeway, the Tramway Company constructed their line across this old lane and along it, for about 200 yards between the two points of intersection, but did not, however, before interfering with the said lane, provide a substituted way, as they were bound to do, by the Railways Clauses Consolidation Act, 1845 ;—(*Paragraph* 11), that the result was—" 1, that the public right of way remained unaffected although the track of the old lane was for a certain distance physically destroyed by the works of the Tramway Company ; and 2, that the Tramway Company were, and continued to be, illegally in possession of the land across and along which the old lane ran before it was obliterated by the works of the Tramway Company" : *Great Western Railway Company* v. *Cole* (2) ; and—(*Paragraph* 13), that, as another result of interfering with a public highway without first making a substituted way, the course of the railway so far as it interfered with the public highway became an "authorized crossing" within the meaning of the enactment contained in the Regulation of Railways Acts : *Coles* v. *Miles* (3).

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(1) This portion of the affidavit is given in the judgment of JOHNSON, J., *infra*, p, 647.

(2) House of Lords, 27th February, 1894, unreported.

(3) Unreported.

The affidavit then referred to the following correspondence:—

22nd August, 1893.

"MY LORD,—In consequence of a deliberate outrage upon our tramway this morning, between Bushmills and the Causeway, whereby our cars were thrown off the line, it is absolutely essential that no persons should walk along the line between Bushmills and the Causeway, as the entire attention of our drivers must be concentrated on their work, and not be distracted by persons upon the line. I must therefore request you to ask the members of your family and servants not to walk along the tram-line, and very greatly oblige.

"At Portcatt the points at both ends of the siding were placed half open by pieces of wood being deliberately placed under the lever weights, so that no car could pass through, from either side, without being thrown off the rails, which actually did occur this morning.

"Yours very truly,

"WILLIAM A. TRAILL, *Engineer*."

24th August, 1893.

"DEAR MR. TRAILL,—I have told my butler to let the servants know that you do not wish them to walk upon the tramway. He tells us they do not use it. But at any rate I have given them your message, and I have explained that the only public right of way, so far as I know, along the tram line between the Causeway and Bushmills, is between Bushfoot and Portcatt. As far as I and the immediate members of my family are concerned, I have the permission of your Chairman. I have no doubt that if and when he desires to withdraw it, he will be good enough to do so himself.

"Yours truly,

"MACNAGHTEN."

4th September, 1893.

"MY DEAR LORD MACNAGHTEN,—Your correspondence with my brother, as to walking on the tramway line, came before our Board on Friday, and I have been requested to communicate our decision to you. Personally I may say I would be very unwilling to withdraw from you and your family the leave already given, which, as far as I remember, was at first given for going to church on foot, on Sundays; but the use of the line by other people has become such an intolerable nuisance that we must put an end to it altogether. The tramcars have to be stopped repeatedly, on account of people on the line, which causes serious delay and inconvenience in this crowded season. Your letter also raises a most serious question, because you say that you have explained to your servants that there is a public right of way between Bushfoot and Portcatt, and no doubt they will communicate this to other persons, on your authority. We cannot, for a moment, admit any such right of way. Perhaps you are not aware that, after we got our Act, public notice was given to all persons to come before the Government arbitrator, and make all such claims, as well as those for compensation for lands taken. Rights of way across the lane were established, and have been provided for, but no one ever suggested a right of way along our line, and we would certainly have contested it if it had been claimed. It is, therefore, too late now for anyone to make such a claim, but if you wish to do so we will try it with you at once. What I have suggested to our Board, and they have agreed to, with regard to the personal leave given, is that, as this crowded season is nearly over, we will not withdraw the leave this year, nor for the winter; but, for our own protection, we feel bound to do so in future from June 1st to October 1st in each year, hoping that we will be able to stop the trespass of other persons at all times. Please also to restrict the leave to members of your own family, or visitors at your house in company with such members, and let servants take the other path through the sandhills and over the wooden bridge. I hope this solution of a rather difficult matter will commend itself to you, and that no friendly relations may be interrupted thereby.

"Very truly yours,
"Anthony Traill."

7th September, 1893.

"Dear Dr. Traill,—Your brother, Mr. W. A. Traill, is, I will not say unreasonable, but rather fickle perhaps and inconstant. When he comes to town he is kind enough, without even the formality of a previous intimation or the ceremony of a subsequent acknowledgment, to refer house agents and tradespeople to me, as if I were a most intimate friend, and a person of at least outward respectability.

In the country he writes to me as if I and mine were given over to malicious outrages, and warns us off the tramway accordingly. These alternations of sunshine and cloud are, as you may imagine, sadly trying to an old man like myself. I am not sorry that the correspondence which he began, if it has to be continued, has passed into other hands. I am therefore much obliged for your note. But I should be unwilling to avail myself of any favour, however slight and trivial, when offered in terms which seem to me to be grudging and unneighbourly.

"Yours truly,
"Macnaghten."

Lord Macnaghten, in his affidavit continued:—(*Paragraph* 15), "On my return from London after the rejection of the Home Rule Bill by the House of Lords, I at once took occasion to exercise my right as one of the public to use the said highway across and over the said tram-line in such a manner as to bring the fact to the knowledge of the Tramway Company and its officers. Since then I have occasionally used the said right of way. I have not only not received notice of any legal proceedings against me by the Tramway Company, but I have not even had any objection made to my using the said right of way, although I am on friendly terms with both Dr. Traill and Mr. Traill, and have met them both repeatedly since. Such user by me of the said public right of way constitutes the so-called trespasses of which Mr. William A. Traill complains in his affidavit. I admit that these so-called trespasses took place as stated by Mr. William A. Traill on the very spot at which Mr. William A. Traill charged the defendant with being upon the tram-line on the date mentioned in the second summons. I say, however, I was not trespassing at all, but that I was there in the exercise of a public right of way, absolutely indisputable and absolutely undisputed, or disputed only on a ground which is plainly frivolous and absurd."

Lord Macnaghten then referred to the summonses, and continued:—(*Paragraph* 17), "It will be observed that in each case the statutory exception or exemption is not specified, or negatived in the summons. A complaint so framed is good by virtue of the Act 40 & 41 Vict. c. 56, sect. 78; but where the exception or exemption is not specified or negatived in the complaint, the complainant is not relieved from the necessity of giving proof in relation thereto, and therefore in the case of each of the two summonses before us, it was incumbent upon the said Company to satisfy the Court by sufficient evidence that the defendant was not on the tramway for the purpose of crossing the same at an authorized crossing."—*Par.* 18 stated that the magistrates in the exercise of their discretion thought fit to proceed with the summonses although the defendant did not appear and was not represented by a solicitor.—(*Paragraph* 19), "In opening the first summons Mr. O'Neill, the solicitor for the Tramway Company, stated the charge, reading the exemption; but he did not call our attention to the point that it was incumbent on the complainants to give proof in relation to that exception or exemption; then he proceeded to make a few remarks, he said that persons of all sorts and conditions were in the habit of using the tramway as a foot path, and that the

Company thought it necessary to make an example of some one for the purpose of deterring the public from so using it, and he dwelt earnestly on the risk and danger to life arising from such user, an argument which perhaps would have been more impressive if the tramway between Portrush and Bushmills had not been constructed under statutory authority on the foot path of the county road."—(*Paragraph* 20), "The person selected by the Company as the proposed example was one John Love. I know the man by sight, but I prefer to repeat the description of him which was given by the sergeant of police in a police case against Love earlier on the same day, because Mr. Traill himself referred to and adopted it in his evidence on the first summons. The sergeant said that Love was a wandering beggar who had haunted the Causeway in the summer, that he appeared to be partly paralysed, and that he was or pretended to be half-witted, but that he had wit enough to run away when he was served with the summons. The sergeant added that he did not know where the man had gone to, and that in all probability he would never trouble Bushmills again. It appeared to me that the Company had not made a happy selection, and that they might have chosen a better example and perhaps a worthier opponent. However, it seemed to me that they must know their own business best, and that the Bench had nothing to do with their choice except that, in consequence of the abject and defenceless condition of the defendant, the magistrates were specially bound to see that the case was strictly proved and that no injustice was done in the exercise of that special jurisdiction which authorizes a Petty Sessions Court to try a man for an offence in his absence."—(*Paragraph* 21), "On the first summons Mr. Traill gave evidence that he had warned Love not to go upon the tramway between Bushmills and the Giant's Causeway, and that after the warning he had met him on that part of the tramway on the occasions mentioned in the summons. In answer to a question from the Bench, Mr. Traill happened to make a reply which was sufficient, in my opinion, to prove that Love was not there on those occasions for the purpose of crossing the tramway by an authorized crossing, and in the result Love was convicted and fined 2*s.* 6*d.*"—(*Paragraph* 22), "When the second summons was called on, I asked Mr. O'Neill whether the defendant was the person who had just been convicted. Mr. O'Neill said he was. I then said, 'Surely, Mr. O'Neill, justice is satisfied. You are not going on against this man again?' As Mr. O'Neill seemed to hesitate, I added, 'Why, we have just fined this absconding pauper 2*s.* 6*d.*, and I don't suppose he has a penny in the world. What more do you want?' Mr. O'Neill said that the Company considered it of the very greatest importance to obtain a conviction in the second case. I could say no more. We had already proceeded *ex parte* in the first case, and at that moment I knew no reason why the Court should not proceed *ex parte* in the second."—(*Paragraph* 23), "Mr. O'Neill then asked Mr. Traill whether he had seen John Love on the line on the day mentioned in the second summons. Mr. Traill said he had. Mr. Traill was then asked whereabouts on the line he saw the defendant on that occasion, and he fixed the place on that part of the line which is constructed across and along the old Bushfoot-lane. At that time Mr. Traill had not proved any statutory offence, for he had not negatived the exception or exemption in the Act of Parliament, or given any proof in relation thereto. I am perfectly certain of that, for I was attending very closely to the case, and, indeed, Mr. Traill in his affidavit does not suggest that any such evidence was given. When the spot on which the alleged trespass took place was fixed by Mr. Traill, and while Mr. Traill was still standing before the Bench in the position of a witness, I said to Mr. O'Neill, 'Surely that is on the track of the old lane. Is there not a public right of way there?' Mr. Traill heard the question, and remained silent. Mr. O'Neill said nothing. I then again suggested that the case should be withdrawn. Mr. O'Neill again refused to withdraw it. I then said, addressing Mr. O'Neill, 'I wish you would tell me what the case of the Company is? Do they say that there never was a public right of way there, or that the right of way, if it existed, has been duly put an end to and determined, or what really is the Company's case?' At the same time Mr. Boyle, one of the presiding magistrates, asked Mr. O'Neill for the Company's special Act. Replying to Mr. Boyle, Mr. O'Neill said he had not got the special Act in Court, and that he did not know, and I think he added he did not care what was in it. Addressing himself to me, Mr. O'Neill said he would not answer any questions; he would not say what the case of the Company was, he was not going to make any admissions, or put forward any contention. Something else he said but I could not catch it as he dropped his voice and rather turned away, and, indeed, I am not sure whether the words which I failed to catch were meant for the ear of the Court or not. I put the question which I put to Mr. O'Neill in the way I did because I really did not know whether the Company intended to rely on Dr. Traill's view that a public right of way is lost or barred by non-claim before the Government arbitrator, a proposition I should perhaps venture to doubt, even if I were not a lawyer; or whether the Company were prepared to contend as Mr. O'Neill's opening statement seemed to suggest, and as it was contended strenuously before the House of Lords, in *The Great Western Railway Company* v. *Cole*, that the enactment contained in the Regulation of Railways Act, 1863, was passed solely for the protection of life and the prevention of accidents, that therefore the enactment applied whether there was a right of way or not, and that the only remedy of the public was to take some proceedings or other to compel the Company to provide a substituted way if their possession was in fact illegal in consequence of no substituted way having been provided before they took possession."—(*Paragraph* 24), "Being thus met in a way in which I had not been met or seen any Judge met in the whole course of my experience, I resolved not to say another word until the plaintiff's case was closed and to let Mr. O'Neill take his own course. Mr. O'Neill did not attempt to complete his case. He put no further questions to Mr. Traill. He called no other witness. He proceeded at once to address the Bench. His argument as I understood it was this—There is no question of title before the Court. If the defendant was here and raised a question of title, the jurisdiction of the magistrates would be ousted; but he does not choose to come forward. The Company have raised no question of title either. They and their adviser keep their mouths shut. The magistrates therefore cannot decline jurisdiction. They must decide the case on the merits. Then he added that however the case might be decided, it could not in the slightest degree affect or prejudice any question of title, and therefore he suggested or seemed to suggest, that the Bench ought, without more ado, convict the defendant. Mr. O'Neill did not sum up the evidence or attempt to deal with the exception or exemption contained in the enactment or explain what I was anxious to hear explained—the very great importance to the Company of a second conviction against a man like Love. When Mr. O'Neill sat down, and the plaintiffs' case was closed, I asked the magistrates one after another what they thought ought to be done? Mr. Orr, to whom the question was first put, said he thought we should impose a small fine. Mr. Boyle said the summons ought to be dismissed as the plaintiffs had not proved their case. Mr. Steen said so too, and so did Captain Robinson. It seemed to me that the majority were clearly right. I did not understand at the time that Mr. Orr intended to dissent, though his suggestion that a small fine should be imposed, was not accepted by the rest. Certainly he did not express any dissent from the Bench or suggest that the magistrates should consult in private. In these circumstances I announced the decision of the Court. I said—'There will be no order.' I did not add another word. The Petty Sessions Clerk said—'That is a dismiss.' I said, 'Certainly.' Then some one, either the Clerk or Mr. O'Neill, said, 'And on the merits?' I said, 'Very well.' So far as I was concerned, if the other magistrates thought fit, I should not have been unwilling to have dismissed the case for want of jurisdiction, if Mr. O'Neill had asked me to do so, and had chosen to admit that there was a question of title in the background. As it was, I gave my voice for dismissal, and so I believe did Captain Robinson, Mr. Boyle, and Mr. Steen, simply and solely on the ground that the plaintiffs had failed to prove their case, and that the evidence of the statutory offence was not complete."—(*Par.* 25), "Mr. Traill is altogether mistaken in saying as he does in his affidavit, that 'when the case for the plaintiffs had closed,' I stated from the bench that I 'believed that there was a public right of way along this particular ground in question, and that the defendant had gone there in the exercise of this right.' After the case for the plaintiffs had closed, I said nothing but the few words I have already repeated. I did not say another syllable. I did not, at any time during the progress of the case, or at all say I believed that the defendant had gone on the ground in question in exercise of any public right. I did not say anything of the kind or anything that could I think by any possibility be so construed or so understood. I had no belief whatever, and most certainly I did not express or intimate any belief on the subject, which seems to me to be wholly irrelevant to the question then before the Court. I did not at any time during the progress of the case say that I believed that there was a public right of way along the particular ground in question. I did, as I have already stated, ask Mr. O'Neill whether there was not a public right of way there. No doubt the question was put in a form anticipating an affirmative answer, and no doubt the question was suggested by my local knowledge. But there was nothing, I submit, improper in that. To put a hypothetical case—suppose Mr. Traill had made a statement (which in fact he did not make) to the effect that there was no authorized crossing at the place in question, I submit that I should have been bound to ask whether there was not a public right of way, and if necessary to call the attention of Mr. Traill and his solicitor to the definition given by Wills, J., of an 'authorized crossing;' otherwise it is obvious that an injustice might have been committed. I apprehend that every person in a judicial position is not only entitled but bound to use his special knowledge (be it local or scientific, or whatever it may be), using it of course fairly and in furtherance of justice."—(*Paragraph* 26), "I had no interest in the matter, except such interest as I had in common with the rest of the public. To me, living as I do now on the other side of the Bush and about one and a-half miles from the place in question, the right of way with which the tramway interferes is in itself a matter of little or no importance, and in the way of convenience hardly worth mentioning. But it is of great importance to a good many people, and I confess I do not like to see any Railway Company setting at nought public rights. I had and have no feeling in the case, except that I do not quite approve of a public Company doing that which no private person, I suppose, would do in his own case—summoning a wretched and defenceless being, merely because he was defenceless—with the object in the first place of having him convicted and punished, for doing that which apparently anybody in a better position, and anybody capable of defending himself might do with perfect impunity, and with the ulterior purpose of using a conviction so obtained as if it were a sentence pronounced in a case where there was a real and not merely a nominal antagonist. A proceeding which may be so described, looks to me something like an imposition on the Court with the view of imposing on the public."

Affidavits were also filed as cause by Messrs. Boyle, Robinson and Steen, corroborating the account of what occurred on the hearing of the two summonses given by Lord Macnaghten in his affidavit.

Mr. Steen further stated:—(*Paragraph* 4), "When the chairman asked the other magistrates what they thought should be done (which he did without expressing or intimating any opinion of his own), I was for dismissing the summons, because I thought that the evidence was not sufficient to establish the charge. And I said so. Mr. Orr, whose opinion was asked first, said he was for putting on a small fine. But afterwards I thought he acquiesced in the judgment of the rest, as he did not suggest that we should withdraw to discuss the point, or intimate to his brother magistrates that he did not agree with them, or openly express any dissent from the bench."—(*Paragraph* 5), "As far as I was concerned, I decided the case solely on the evidence adduced by Mr. Traill. Giving that evidence the best consideration in my power, I thought it was not sufficient to warrant us in convicting the defendant. At the same time I have no hesitation in saying that I was not at all sorry when I found myself forced to that conclusion. I thought the whole proceeding anything but creditable to the prosecution. It was hardly fair play, as it seemed to me, to bring up a miserable creature like the defendant—the most miserable and helpless creature perhaps in the whole country side—by way of example for conviction and punishment, when there were admittedly plenty of respectable people who might have been summoned for the offence with which the defendant alone was charged."—(*Paragraph* 6), "Having regard to the time of the year when the complaint was brought, and to all the circumstances of the case, including the way in which the prosecution was conducted in Court, I have no doubt that Mr. Traill's object was to obtain a conviction against somebody, no matter whom, for passing over the tramway along the track of the old Bushfoot lane, when Lord Macnaghten was on the bench. It is obvious how such a conviction might be used if the Company desired to escape from their statutory obligation to make a substituted road in place of the highway with which the tramway now interferes. If that was not the object of the prosecution, it is difficult to see what was to be gained by a second conviction against the same defendant. Mr. O'Neill urged upon the Court the extreme importance to the Company of a second conviction, but he did not explain in what the importance lay, or give the Court any assistance on that point."

Dr. A. Traill, in an affidavit in reply, stated that, on the day in question, Love had been prosecuted by the police for constant begging, and had been sentenced to fourteen days' imprisonment, with hard labour; that the evidence was the same in both cases; that in reference to the first summons W. A. Traill stated, in answer to a question from Lord Macnaghten, "that he had met the defendant near the bridge over the River Bush (half a mile or so beyond the spot subsequently in dispute)"; that Love for this was fined 2*s.* 6*d.*; "that the spot where Love trespassed was not mentioned in the first instance by Dr. Traill, nor was he asked about it by the solicitor, Mr. O'Neill; but Lord Macnaghten, as in the former case, asked Mr. Traill whereabouts on the line he saw the defendant on that occasion, as stated in his lordship's affidavit, though so worded there as to imply that the question was asked by Mr. O'Neill, and Mr. Traill fixed it as upon that part of the line which lies between Bushfoot and Portcatt; upon this his lordship stated that there was a public right of way there, but Mr. Traill immediately stated that the Company did not admit that there was any such right of way as that mentioned by Lord Macnaghten."—(*Paragraph* 5), "No such question" (as to the absence of proof negativing the exemption) "arose at any time in the course of the case, nor did his lordship suggest that there was any informality in the summons; and, as a matter of fact, there was ample evidence before the Court that Love could not possibly have been at that particular spot for the purpose of crossing the line in the exercise of any supposed public right, because the evidence, in the two previous cases in which he was convicted, showed that the man was in the habit of begging almost daily at the Causeway, and that our line was the route he took regularly, on his way there, to avoid the long hilly route by the sandhills. Moreover, if any question had arisen as to the existence of an authorized crossing at that part of the line, our Company could have easily proved that two such crossings have been provided, not at the point at which the trespass was proved but at points considerably distant at each side (as the result of the inquiry before the public arbitrator) at the two points where the railway crosses the old lane, to which his lordship refers. These crossings, with double gates on each side, are at present used by the farmers, for whose accommodation the old lane was originally provided, in substitution for the old right of way claimed by them; and there is no objection to these crossings being used by the public.—(*Paragraph* 6), "That our Company could have had no such 'ulterior purpose' in view is apparent from the fact that the trespass complained of in the summons, and proved in evidence before the magistrates, did not raise in any shape the alleged claim to a public right of way, inasmuch as Love's act, on the occasion in question, was a continuous trespass from Bushmills to the Causeway, and from the further consideration that, if I had the least idea that any question of title, along or across the line, would have arisen, I would certainly have objected to Lord Macnaghten remaining on the bench, considering that he is the only person in the community who has raised this question against the Company, and that he never raised it for eleven years, and not until last year when his servants were warned off the line as trespassers, not for crossing the line at the point in dispute, but for walking along it."

The affidavit then referred to a permission to use the line given to Lord Macnaghten and his family, originally "for going to church on Sundays," and continued:—(*paragraph* 7), "It had become absolutely necessary for the Company to put a stop to this man's trespass on the line, because he had become such a nuisance, owing to his deafness, that, as I am informed by the tramway officials, crowded trains had repeatedly to be stopped till he was removed off the line and out of the way. So far from the Company endeavouring indirectly to get a decision in their favour on a question of a supposed right of way, what the Company take exception to in the action of his lordship is that he used his position as chairman to get a decision from the bench hostile to

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the Company on the very question in dispute between himself and the Company."—(*Paragraph* 8), "When I heard the question of title for the first time raised from the bench by Lord Macnaghten, I remarked to Sir Francis Macnaghten that I thought his lordship should not have done so when he was involved in that issue himself, and possibly I should then have objected to his lordship taking any further part in the case, but it never occurred to me that this question as to the alleged right of way on the particular spot referred to by Lord Macnaghten could in any way have been involved in the summons against Love, inasmuch as the evidence disclosed that on the occasion in question he was trespassing on the entire length of railway from Bushmills to the Causeway, and in so doing had necessarily passed over the portion of the line which is crossed by the alleged right of way. Moreover, for obvious personal reasons, I refrained from asking his lordship to leave the bench, as it might have looked like a personal insult in open Court to a gentleman with whom I have always been on the best of terms, and for whom both personally and as a great lawyer I entertain a profound respect. Mr. O'Neill, however, objected in the strongest manner to the question of title being raised by his lordship and by anyone on behalf of an absent defendant."—(*Paragraph* 9), "On the affidavit of Mr. Steen I have to remark that he can scarcely be considered impartial on this matter, and should not have sat on the bench on that occasion, because he himself was one of the persons warned off the railway as a trespasser, not for trying to cross the line at the point in dispute in the exercise of any supposed right of way, of which he as a newcomer to the district (as manager of the Bushmills Distillery) could have known nothing, but for making a promenade of the whole line to the sandhills by the sea for any and every distance. It is obvious that, in his case also, if the Company had been raising, even indirectly, the question of this supposed right of way I would certainly have objected to his remaining on the bench when Sir Francis Macnaghten and myself retired from it."—(*Paragraph* 10), "But Mr. Steen says in his affidavit—'I was for dismissing the summons, because I thought that the evidence was not sufficient to establish the charge.' This was a very remarkable conclusion to arrive at, because so far as the actual trespass was concerned the evidence was precisely the same as in the previous case in which the defendant was fined 2*s.* 6*d.*, and words the same as those used by Mr. Steen are used in the affidavits of Mr. Boyle and Captain Robinson, and if they have any meaning at all they can only refer to the want of the negative evidence referred to by Lord Macnaghten (paragraph 17), as supposed by him to be required by the Act, 40 & 41 Vict. c. 56, sect. 78." (*Paragraph* 11):—"With regard to the affidavit of Mr. Boyle I have, in addition to what I have already said in reference to that of Mr. Steen, to make this special observation. Happening to meet Mr. Boyle a few days after, at the Golf Club, Portrush, I asked him, in a friendly way, how he came to be a party to assist Lord Macnaghten in getting what was practically a decision in his own favour, on a point in dispute between him and the Company. Mr. Boyle expresssed some surprise, and said that he had never heard that there was any question as to the supposed right of way between his lordship and the Company, and that he had simply dismissed the case, because, as the old man had already been fined 2*s.* 6*d.* for a similar offence, and had been sentenced to a fortnight in gaol, with hard labour, for begging at the Causeway, he thought it would look like persecution to fine him again, but he, Mr. Boyle, never made the slightest suggestion to me then of a want of sufficient evidence for the conviction. Mr. Boyle afterwards thought that he had perhaps committed himself too much by what he had said, for he came after me some hours later on the same day, and asked me not to mind what he had said, and to consider that he had expressed no opinion."—(*Paragraph* 12), "In conclusion, I state most emphatically that at no period during the progress of this case was there the slightest discussion as to the necessity of the plaintiff negativing an exemption or exception, and the sole ground at any time suggested for dismissing the case was that of the alleged existence of a public right of way, as to which absolutely no evidence was suggested, save and except so far as it was contained in the statement from the bench by Lord Macnaghten, that a public right of way existed over the place in question."

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An affidavit was also filed by Mr. O'Neill, the applicants' solicitor, who said (*paragraphs* 3 *and* 4): "As to the second summons I stated that the plaintiffs considered it important to obtain a conviction in this case also, as the defendant made a practice of walking right along this portion of the plaintiffs' line of railway as a short cut; that, as he was very deaf and decrepit, he was a cause of much inconvenience to the plaintiffs, and danger to himself and their passengers; Mr. Traill was again examined, and proved this."—(*Paragraph* 5), "That the defendant did not appear, nor was he professionally represented; that due proof of service was given; and that no evidence of any kind was given on his behalf, nor any question of title raised on his behalf." He then stated: "I had never heard any mention of a supposed right of way at the place in question, until Lord Macnaghten distinctly stated from the bench that he believed there was a public right of way on this particular ground in question, and that being the case, the defendant had a right to be there, and that he, Lord Macnaghten, would not fine him but would dismiss the case. I pointed out to Lord Macnaghten that the defendant did not appear, and that there was no evidence raised of title, or any other sort or kind given or tendered on his behalf, and that there was sufficient evidence before the Court to entitle the plaintiffs to a conviction, and that the evidence was identical with that in the previous case in which the magistrates convicted. Lord Macnaghten still held to his opinion that he would dismiss the case on the ground of this being a public right of way, and, after consulting with the other magistrates, he gave a decision that the majority of the magistrates dismissed the case on the merits; Mr. Orr, R.M., dissented."—(*Paragraph* 6), "It is entirely incorrect, as stated by Lord Macnaghten, that I refused to answer him when he asked what our case was, and that he had any discussion with me as to negative evidence; such a point was never raised or hinted at in any way by any member of the bench, or by any one else, nor could any of the magistrates have for a moment supposed that the defendant was there for the purpose of crossing the line, as the evidence was perfectly clear that he had walked right along the plaintiffs' line of railway, and used it as a short cut from Bushmills to the Causeway, a distance of nearly two miles"—(*Paragraph* 7), "I positively repeat that the sole and only ground ever raised or suggested, during the hearing of the case, as a ground for dismissing the second summons, was the point raised at the time by Lord Macnaghten himself as to the alleged existence of a public right of way, the sole foundation for which was the statement made by Lord Macnaghten from the bench, as to his own belief that such a right of way existed. I further most positively swear that no reference of any sort or kind was made by anybody as to negativing an exception or exemption, and the first I ever heard of such a point in connexion with this case was when I read the affidavit of Lord Macnaghten."

An affidavit, in answer to the foregoing, was filed by Sir Francis Macnaghten, who stated that he remembered, when Dr. Traill and he rose to leave the bench, that Dr. Traill turned to Lord Macnaghten, who had been sitting between them and was inclined to come away, and pressed him to stop and dispose of the tramway cases.

A further affidavit was filed by A. H. Steen and J. Boyle, in which Steen stated that he had never been (as alleged) warned off the line as a trespasser; that there was no ground whatever for imputing partiality to him; that he had no wish to sit in any of these tramway cases; and continued (*par.* 7):—"I am positively certain that Lord Macnaghten did not state from the bench that he believed that there was a public right of way on the particular ground in question, or that the defendant had a right to be there, or that he (Lord Macnaghten) would not fine him, but would dismiss the case. I was sitting next Lord Macnaghten. Nothing of the sort was said by him publicly in Court or privately to me at any time during the progress of the case. From the moment when Mr. O'Neill answered Mr. Boyle and Lord Macnaghten in the manner described in Lord Macnaghten's affidavit, his lordship did not say a single word until he asked the magistrates their opinion at the close of the case, nor did he, by look or gesture, intimate any opinion on the matter before the Court or on the way the case was being conducted."—(*Paragraph* 8), "It is not the fact, as alleged by Dr. Traill, that Lord Macnaghten used his position as Chairman to get a decision from the bench hostile to the Company. He did not from first to last express or intimate any opinion whatever beyond suggesting, as stated in his affidavit, that, after the conviction in the first case, the second summons should be withdrawn. Even in asking the magistrates for their opinion he did not intimate any opinion of his own, or seek to influence us in any way. The decision of the bench would probably have been the same if Lord Macnaghten had been in favour of a conviction. Without reckoning him, three magistrates out of five were for acquittal, and all on the same ground openly stated by all, that the offence alleged had not been proved."—(*Paragraph* 9), "Nothing whatever was proved in the second case except that the summons was duly served, and that Love, after having been warned not to be on the tramway, was found on the line at a certain point, which is now admitted to have been on the track of the old Bushfoot lane. There was no evidence that Love had passed or intended to pass along the line, nor indeed, in the first case, was anything proved as regards the locality of the alleged trespass (for only one trespass was proved in that case), except that Love was seen at another point on the line, which was specified by Mr. Traill. The allegations to which Dr. Traill refers as having been proved in the first case as to Love's habit of going along the line, and the route which he used to take to the Causeway, and his reasons for taking it, were not proved as a matter of evidence; they were put forward loosely and generally by Mr. Traill on information which he said he had received from his servants, but no one of his servants was called to prove them."—(*Paragraph* 10), "There was this distinction between the first case and the second, that, in the first case, when the place at which the trespass occurred was fixed by Mr. Traill, he was asked by the Chairman whether anybody except the tramway officials had any business or any occasion to be there, and whether there was any authorized crossing there or thereabouts; both these questions Mr. Traill answered substantially in the negative." — (*Paragraph* 11), "Undoubtedly in the second case Lord Macnaghten did ask whether the place fixed by Mr. Traill as the spot where the trespass occurred was not on the track of the Old Bushfoot lane, which is now admitted, and whether there was not a public right of way there, which is now apparently not disputed. Out of those two questions and out of those questions alone the whole of the charges, imputations, and insinuations with which Dr. Traill's affidavit abounds have been evolved. There was no other expression used by Lord Macnaghten or by any other magistrate present which could afford the slightest foundation for Dr. Traill's assertion that Lord Macnaghten raised a question of title, or for any of Dr. Traill's suspicions or accusations, or for Mr. O'Neill's representation of Lord Macnaghten's language and opinion."—(*Paragraph* 12), "I entirely agree with Dr. Traill that if he had foreseen the difficulty which arose in the second case, he would gladly have dispensed with Lord Macnaghten's attendance, and I also agree that nothing probably was further from his intention, or the intention of the Company, than that any questions of any sort should be raised or should crop up."

Mr. Boyle stated (*Paragraph* 18):—"I observe with great regret that Dr. Traill professes to give an account of a private conversation with me at an interview upon the Portrush Golf Ground. The interview was not of my seeking. Dr. Traill came to me, and, as he says himself, he came in a friendly way, though his introductory question as he gives it would in the mouth of anyone else have seemed rude and insulting. I do not admit the accuracy of Dr. Traill's account of that interview. I said nothing inconsistent with what I had said on the bench. More than this I decline to say. I will not under any provocation condescend to follow Dr. Traill's example, which in my humble judgment is hardly in accordance with the common understanding that governs and protects social intercourse, to say nothing of what is required by the ordinary standard of honour among gentlemen. Later in the same day I went to Dr. Traill; I did so not because I thought I had committed myself, but because I had a misgiving that Dr. Traill's friendly say with me must have had some purpose, so I went to him and said that of course what had passed between us in the morning would go no further. I left him under the impression that he quite acquiesced in what I said, indeed he led me to think so. At the same time Dr. Traill is entitled to the benefit of the observation (if he thinks it is in his favour) that he did not formally and in express words give me an assurance and undertaking to that effect."

Ronan, Q.C. (*Campbell, Q.C.*, and *James Traill*, with him) for the applicants:—

Save for the existence in Lord Macnaghten's mind, in regard to the second summons, of a certain belief or knowledge as to the alleged right of way, and for his statement in regard thereto, the evidence in the two cases was identical. If, therefore, the justices convicted in the first case they were bound to come to the same conclusion in the second case. If it was necessary to negative the exception in the second case it was necessary to do so in the first; but this question of negativing the exception was never present to the mind of any of the justices, save, perhaps, Lord Macnaghten, and it did not affect his decision on the first summons. There was no evidence as to any right of way before the justices save Lord Macnaghten's statement. Such a statement of fact made by one of the presiding justices would be sufficient to vitiate the proceedings. A Judge may use his local or special knowledge in order to obtain evidence, but may not substitute such knowledge for, and use it in default of, legal evidence. Here one of the justices was Judge and witness in the same case; further, he was Judge and witness in his own case, for he knew that there was involved a question of a right of way of which he was the champion; otherwise the evidence in the two cases was the same. There was no evidence that there was a highway at the second point at all, and the evidence was that Love was going along, not across, the line.

[O'Brien, J.: It might appear sufficiently on the complainants' case that there was a highway. There was the evidence of difference of locality which developed the objection, and there was the evidence of silence; O'Neill was asked was there a right of way, and did not answer.]

[Johnson, J.: The question is whether this was taken as an admission of the alleged right,]

But Lord Macnaghten said that if the prosecutors' solicitor had admitted the right he would have nilled the case. There was no contumacy, but the solicitor could not have made such an admission. The sole ground relied on by the justices as the foundation of their decision is the non-proof of the exception; and his lordship's view on this matter is, we submit, wrong.

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[HOLMES, J.: We are not called on here to say, and we should be going out of our way if we decided, that the view taken by the justices was right or wrong; the question is whether or not they had jurisdiction to dismiss the summons.]

As to negativing the exception. At common law, a prosecutor was bound in his summons to negative all exceptions which either appeared directly in or were incorporated with the enacting clause under which the prosecution was instituted: Nun and Walsh, Justice of the Peace (ed. 1844), vol. i., p. 509. But as to evidence with regard to offences which were only made penal by the want of certain qualifications in the offender, or by the absence of some exculpatory circumstances, it was clearly settled that the evidence authorizing a conviction need not notice such negative allegations in the charge, and any qualifications or exceptions, though annexed to the offence itself, and therefore necessary to be noticed in the information, must be substantiated in evidence by the defendant, if he relied on them: *Ibid.*, p. 540, and see cases there cited. And so as to indictments the rule is stated in Archbold (ed. 1893), p. 241, that where the subject of the averment relates to the defendant personally or is peculiarly within his knowlege, the negative is not to be proved by the prosecutor, but on the contrary the affimative must be proved by the defendant as a matter of defence. Such was the rule at common law. Then came the Petty Sessions (Ireland) Act, 1851, sect. 20, sub-sect. 1 (1); and then the County Courts Act of 1877, sect. 78 (2), the effect of which is (*a*) that the complainant need not mention the exceptions in the summons, and (*b*) that if he mentions them he need not prove them, but the defendant is given full liberty to prove the affirmative. But the general rule of pleading is that if there is a good summons, or statement of claim, the plaintiff need not prove more than is in it, and we submit that the meaning of the provision of the Act of 1877 must be that, *even* "if so specified," no proof shall be required from the complainant. Otherwise a complainant could only get the benefit of the provision that he need not prove the exceptions by losing the benefit of the previous provision that he need not state them. [Counsel referred to the corresponding enactment in the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), sect. 17 (3), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 39 (2)]. Besides, the defendant's intention in this case was a matter peculiarly within his own knowledge. He best could say whether he used the line "for the purpose of crossing at an authorized crossing" or not.

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(1) *The Petty Sessions (Ireland) Act*, 1851 (14 & 15 Vict. c. 93), sect. 20, sub-sect. 1, provides:—

"If the information or complaint shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the complainant to prove such negative, but the defendant may prove the affirmative thereof, if he will have advantage of the same."

(2) *The County Officers and Courts (Ireland) Act*, 1877 (40 & 41 Vict. c. 56), sect. 78, provides:—

The objection on the ground of bias was not specifically put forward in the first affidavit; it was developed in the affidavit of Lord Macnaghten, which discloses, as we submit, a real and substantial bias sufficient to disqualify him from adjudicating on the second summons. No question of acquiescence arises by reason of Dr. Traill having asked Lord Macnaghten to remain and adjudicate, because it is stated by Dr. Traill that it never dawned on him that any question as to this right of way would have arisen. The point arose wholly unexpectedly, from a question put by Lord Macnaghten himself. The rule as to bias is laid down in Paley, on Summary Convictions (ed. 1892), p. 46, "if a justice has such an interest as might give him a real bias in the matter, he should not only take no part in the decision, which would render it void, but should entirely withdraw during the whole case." [On this point counsel also referred to: *Reg* (*Townley*) v. *Justices County Louth* (1); *Reg* (*Ellis*) v. *Justices County Dublin* (2); *Reg* v. *Meyer* (3); *Reg* v. *Evans* (4)]. If necessary the Court should permit the

"In all cases of summary jurisdiction any exception, exemption, proviso, qualification, or excuse, whether it does or does not accompany the description of the offence complained of, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required from the complainant, unless evidence shall be given by the defendant concerning the same."

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(1) 23 Ir. L. T. R. 40.

(2) [1894] 2 Ir. R. 527.

(3) 1 Q. B. D. 173.

(4) 17 Cox C. C. 81.

conditional order to be amended so as to include bias as a ground.

A dismiss is an "order" of the justices just as much as a conviction, and this Court can remove and quash such order.

[O'BRIEN, J.: There is one case (1) referred to in the books as an authority for the proposition that an acquittal can be removed by *certiorari*—but that case, I find, has no relation to this question, for there the writ issued only to bring up the record to prove in another case the fact of the acquittal. The strongest argument is that the Legislature has not given an appeal from a dismiss without prejudice.]

But the right of appeal is the creature of statute, and only exists where statute confers it; it is the opposite with *certiorari.* The adjudication of a tribunal, one of the members of which is biassed is no adjudication; it is made "without and in excess of jurisdiction"; the decision is tainted, and, whether an order of conviction or of acquittal, it should be removed and quashed.

Atkinson, Q.C., and *Ross, Q.C.* (*R. F. Harrison*, with them), for the Justices:—

No "dismiss" by justices, whether "on the merits," or without prejudice" has ever been removed by *certiorari.* The issue of the writ, even assuming that the Court has jurisdiction to order that it should issue in such a case, would be meaningless, unless it were possible to institute a fresh prosecution against the accused. But this course would be utterly without precedent. In the case of a conviction which has been removed on *certiorari* and quashed, it may be said that the conviction was no trial, and that putting the accused again on trial is not vexing him twice *in eadem causa.* But once a prisoner is acquitted of an offence, for that offence he cannot be put again on trial. There is no direct affirmative authority on the point, but the absence of any reported instance of the issue of the writ in the case of an acquittal is significant; and assistance may be derived from new trial motions in misdemeanour; a new trial in misdemeanour may be obtained where there has been a conviction, but not where the accused has been acquitted. In

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(1) *Jackson* v. *Oaks*, 11 Jur. 1105.

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Reg v. *Duncan* (1) the defendant had been acquitted on an indictment for the non-repair of a highway, and a new trial was sought on the ground of improper reception of evidence, and there Lord Coleridge, C.J., said—" The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment, no new trial will be granted if the prisoner or defendant, having stood in that danger has been acquitted." And it is to be observed that orders, made through interest, are voidable, not void: *Dimes' Case* (2).

[Counsel also referred to *Reg.* v. *Scaife* (3)—a case of new trial granted, *per incuriam*, after acquittal in felony, and disapproved of in *Reg.* v. *Duncan* (1)—and to *Reg.* v. *Bertrand* (4); and *Reg.* v. *Berger* (5).]

When asking for the conditional order, the applicants had all the materials before them, if they wished to allege bias; and they do allege bias in the affidavit upon which they applied for the order. That affidavit states that Lord Macnaghten was himself a trespasser on the very spot. They asked for the order on both grounds, but accepted it on the ground of want and excess of jurisdiction alone; although bias or interest as a ground for *certiorari* is always expressly stated on the conditional order. They cannot therefore now rely on any allegation of bias. Their first affidavit clearly suggested that Lord Macnaghten had acted as Judge and witness in his own case; and further it misrepresents the facts, for it suggests that Lord Macnaghten said nothing until the case closed, and then said—" There is a right of way here and we dismiss the case." On an *ex parte* application of this kind there must be a full and fair disclosure of the facts, and a person will not be allowed to travel outside of the facts stated.

[HOLMES, J.: This was a case of a tribunal having jurisdiction at the commencement of the case, which jurisdiction was, it is alleged, destroyed by the conduct on the bench of a particular individual; taking the affidavit on which the conditional order was based, it seems to me to be impossible to give any intelligible meaning to the ground mentioned in the order—want and excess of jurisdiction—unless it refers to the action on the bench of Lord Macnaghten.]

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(1) 7 Q. B. D. 198.
(2) 3 H. L. C. 759.
(3) 17 Q. B. 238.
(4) L. R. 1 P. C. 520.
(5) [1894] 1 Q. B. 823.

[JOHNSON, J.: My recollection is that Mr. Campbell applied on both grounds—jurisdiction and interest—and it was on the first not the second that I acted. It is the practice of the Court to state this ground expressly in the order. It was not present to my mind that this was the case of an acquittal.]

[HOLMES, J.: At least the order may be susceptible of the construction which Mr. Ronan puts on it; and we should therefore, I think, hear the matter fully.]

Assuming that any bias existed in Lord Macnaghten's mind, the existence of that bias was well known to the prosecutors when the summonses were issued. That appears clearly on the correspondence, on the affidavits, and on the trial itself. But it is clearly settled that if a party, or even a party's solicitor, knows of the prejudice or bias, and does not then protest, he cannot afterwards object. [On this point counsel referred to *Reg.* v. *Justices County Dublin* (1); *Reg.* v. *Richmond Justices* (2); *Reg.* v. *Justices of Kent* (3); *Reg.* v. *Commissioners of Cheltenham* (4); *Reg.* v. *Justices of Salop* (5); and *Wakefield Local Board of Health* v. *West Riding &c., Railway Company* (6).] And not only did they not protest against Lord Macnaghten assisting in the adjudication, but they deliberately asked him to remain and adjudicate in a case in which they must have known that a question would probably arise in which he was (as they say), an interested party. Nay more, when the discussion as to this right of way had arisen in a definite form, they still acquiesced in his remaining on the bench, although Dr. Traill admits that it suggested itself to him that he should then have objected.

But, apart from all other objections, no bias or interest whatever has been shown to have existed here such as would disqualify Lord Macnaghten from adjudicating on the case. Admittedly, there had been a public right of way along this lane at one time; the Company's contention was that it had been lost as the result of the award of the Government arbitrator. Lord Macnaghten

(1) [1894] 2 Ir. R. 527.
(2) 8 Cox C. C. 314.
(3) 44 J. P. 298.
(4) 1 Q. B. 467.
(5) 2 Ell. & Ell. 386.
(6) 1 Q. B. 84.

had the same interest in the right of way as any other member of the public, and no more. He did not give evidence. He merely asked a question—"Is there not a right of way here? what is your case? has not the man been fined already?" and neither the prosecutors' solicitor nor their witness would give any answer, or assist the Court, although, when the accused is absent, it is the duty of justices to be doubly strict in seeing that the case is proved: see *Reg.* v. *Smith* (1). Pecuniary interest, however small, will disqualify a justice; but "bias" to be a ground of disqualification must be real, as, for instance, where the justice is identified with one of the litigants: *Reg.* v. *Fraser* (2); *Reg.* v. *Meyer* (3); *Reg.* v. *Rand* (4); *Reg.* v. *Justices of Huntingdon* (5); *Reg.* v. *Huggins* (6). In this last case the justice was a member of a small, privileged class, with an interest directly opposed to the defendant. In *Reg.* v. *Farrand* (7), a justice was held not to be disqualified, though, at the instance of one of the litigants, he had attempted to settle the dispute which was the subject matter of the summons, and though he was summoned as a witness in the case, and is stated to have had a bet on the result. [Counsel also referred to *Reg.* v. *Handsley* (8); *Reg.* v. *Bolingbroke* (9); and *Leeson* v. *General Medical Council* (10), as dealing with and explaining the case of *Reg.* v. *Allan* (11)].

The Court cannot entertain the question whether the justices were right or wrong in their decision. It cannot compel them to believe a witness, or not to draw certain inferences from his silence. This Court may interfere where the justices refuse to entertain a case, where they refuse to exercise the discretion vested in them: *Reg.* v. *Adamson* (12); but if they hear the case and exercise their discretion, this Court will not review their decision. The justices heard this case, and, on the refusal of the prosecutors to supply them with any information, they were, we submit, fully justified in declining to act on the evidence so given, and in thinking that there must be something underlying the matter. The Court is asked to infer that the accused was walking along the line; but the evidence was simply that he was at a particular spot on the line, and the whole case would be meaningless if it had been proved that the man had been walking along the whole line.

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(1) L. R. 10 Q. B. 604.

(2) 9 *Times* Rep. 613.

(3) 1 Q. B. D. 173.

(4) L. R. 1 Q. B. 230.

(5) 4 Q. B. D. 522.

(6) 11 *Times* Rep. 205; [1895] 1 Q. B. 563.

(7) 20 Q. B. D. 58.

(8) 8 Q. B. D. 383.

(9) [1893] 2 Q. B. 347.

(10) 43 Ch. D. 366.

(11) 4 B & S. 920; 33 L. J. (M. C. 99).

(12) 1 Q. B. D. 201.

On the question of the *onus* of proof as to the exemption—on which see Molloy's Justice of the Peace, p. 632—we are prepared to argue that the justices were right, but this matter is not, we submit, open to review on a motion for *certiorari*. [The Court intimated that it would be undesirable to pronounce any opinion upon this matter on the present occasion.]

Campbell, Q.C., in reply:—

Though, unquestionably, the practice has been to mention bias or interest in the conditional order, still the objection on this ground is, I submit, open under the head of want of jurisdiction, and it is so stated in Mellor and Short, Crown Practice (ed. 1890), p. 117. The Court is entitled to look at the real motive that actuated the tribunal in their decision, and if it is found that the motive which they put forward is not the real one, the Court should interfere: *Reg.* v. *Adamson* (1); *Reg.* v. *Boteler* (2); *Colonial Bank of Australasia* v. *Willan* (3). In this case the justices never entertained the summons legally, or heard and determined it. The sole ground put forward as the ground of the justices' decision was that the case was not proved. This must mean that they decided the case on Lord Macnaghten's statement as to the alleged right of way. The point as to negativing the exceptions was not present to their minds, and was never mentioned during the progress of the case, or in the decision; and it was never suggested that they were influenced by the solicitor's refusal to answer.

The affidavit on which the order was obtained gives the facts shortly but fairly, and on it no order could have been obtained save on the ground that one of the justices, either from mistake or bias, acted so as to make himself a witness in a case in which he had a personal interest. It is not necessary to allege more than

(1) 1 Q. B. D. 201. (2) 4 B & S. 959. (3) L. R. 5 P. C. p. 444.

that this was the result of mistake, for that would be sufficient to invalidate the order. It would be a most dangerous thing if justices were permitted to act on their local knowledge without legal evidence: see per Whiteside, C. J., in *Reg.* v. *Justices of Antrim* (1). The Company could have no ulterior object in the second summons; they wished to get rid of a person who, as was stated, was a constant trespasser along their whole line, and who by reason of his infirmities was a source of danger to himself and others. Until Lord Macnaghten asked the question that was answered by fixing the old lane as the point where the trespass was committed, no one could have foreseen that this matter would have arisen. That Dr. Traill asked Lord Macnaghten to remain and adjudicate, shows of itself that he did not anticipate any bias or the possibility of any question arising in which bias might be developed. Therefore it was not necessary that the persons representing the Company should have been in ignorance of and should have stated their ignorance of the bias. It is sufficient if a justice puts himself in such a position that, even unconsciously to himself, a bias adverse to the due administration of justice may take possession of his mind: *Reg.* v. *Justices of Great Yarmouth* (2).

As to the jurisdiction of this Court, the text-books say that *certiorari* lies to remove all orders generally. In Comyn's Digest it is said that "*certiorari* lies to remove all orders;" and in Paley, on Summary Convictions, that it lies to "remove all orders and convictions." This is an "order" under the Petty Sessions Act, and therefore, *prima facie*, *certiorari* lies. If it does not, then there would be no remedy where a dismiss had been obtained, even through the grossest misconduct. The proper order in this case would have been "no rule, a question of title being involved." For this reason the defendant was never in danger of the law, and therefore the same principle would apply which holds in cases of conviction. In *Reg.* v. *Handsley* (3), which was a case of a dismiss, the Court was asked to grant a *mandamus*, and therefore it must have been assumed that the order of dismissal should be got

(1) 9 Ir. L. T. R. 156.
(2) 8 Q. B. D. p. 527.
(3) 8 Q. B. D. 383.

rid of by some order in the nature of a *certiorari*. That was civil case, but the principle would be the same.

Cur. adv. vult.

June 13.

SIR P. O'BRIEN, C.J.:—

On the 11th of last September a summons, brought by the Giant's Causeway, Portrush and Bush Valley Railway and Tramway Company against a man named Love, for an alleged trespass on the line of the complainant Company, came on to be heard at the Bushmills Petty Sessions, before certain justices of the peace for the County Antrim, of whom, on this particular occasion, Lord Macnaghten was chairman. The justices made an order dismissing, on the merits, the complaint contained in the summons, and on the 30th of last November the Company, relying on an affidavit made by Mr. William Traill, their engineer, obtained a conditional order for writs of *certiorari* and *mandamus* to remove, with a view of being quashed, the said order of dismissal, and to compel the magistrates to rehear the complaint. Cause has been shown by the magistrates who made the order of dismissal, and a motion has been made to us, on their behalf, to discharge the conditional order, with costs. The matters in dispute were debated before us at considerable length, and we deferred judgment until to-day.

The conditional order which was obtained by the Company was granted on the ground that the justices "acted without, and in excess of, jurisdiction." It was sought by the counsel who applied for it to base the order on an additional ground, viz. upon the alleged bias of one of the magistrates, namely, Lord Macnaghten; but the Court refused to include that ground of impeachment in the order, as, in the opinion of the Court, there was not in the affidavit of Mr. William Traill, upon which the application was grounded, a sufficient foundation of fact to warrant them in granting the order on that ground. Whatever the rule may be in England, it is our settled practice here, as the officers of the Court, and the precedents they referred to, showed, if an adjudication at Petty Sessions is to be impeached on the ground of bias, to state that ground specifically in the conditional order. Though that ground of impeachment was not only not included in the conditional order, but was expressly excluded from it by the ruling of the Court, and notwithstanding the rule of practice that I have adverted to, yet, having regard to the nature of the arguments before us, to the affidavits which have been filed, and to the challenges which have been given on both sides, we think it is more satisfactory to deal with the case as if the ground of bias was included amongst the heads of impeachment comprised in the conditional order.

We are all of opinion that the conditional order cannot be sustained on any of the grounds advanced in support of it. One fatal objection presents itself *in limine*. The offence with which Love, the defendant in the summons, was charged is one punishable by fine and imprisonment, and the order sought to be quashed is one of acquittal. In the whole range of our law there is no precedent for the granting, or even the making, of such an application in a case where there has been an acquittal by the magistrates. Not only is the application unwarranted by precedent, but principle cannot be referred to in support of it; on the contrary, to grant this application for a writ of *certiorari* to quash the order for acquittal, and for a writ of *mandamus* to compel the magistrates to rehear the complaint, would be to act in disregard of one of the most deep-rooted principles of the law. It would be a direct infringement of the principle that no one is to be tried twice for one and the same offence. *Nemo debet bis vexari pro una et eadem causa* is a maxim embodying one of the most cherished principles of our law. In reference to this, it is stated in Mr. Paley's excellent work on Summary Convictions that this maxim is one of general application to civil and criminal proceedings, to actions, and to summary convictions and indictments. In giving judgment in the case of *The Queen* v. *Duncan* (1), Lord Coleridge said:—"The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind, where a prisoner or defendant is in danger of imprisonment, no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." It has been argued that the Company's position as regards this alleged public way has been prejudiced by the

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(1) 7 Q. B. D. 198.

Sir P. O'Brien, C.J.

adjudication that has been made; but, in my opinion, the principle to which I have referred is not to be whittled down, or a subject who has been acquitted deprived of the benefit of it, because the record of his acquittal may be admissible in evidence in relation to the civil rights of other persons. I speak, of course, of this principle in relation to authorised tribunals. If the case were one where the tribunal was *ex facie* wholly unauthorised, and the accusation and accused plainly *coram non judice*, the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity—not merely voidable, but void. But there is no analogy between the bench of magistrates that presided at Bushmills on the occasion in question and a tribunal wholly unauthorised, *ab initio* and *ex facie*. Nor do I stop to consider the case of an acquittal brought about by the fraud of the accused, and the corruption by him of the presiding tribunal. It is unnecessary in the present instance to consider whether even in that case there would be any limitation of the application of the principle to which I have referred, or whether the only remedy would be prosecution, by criminal information or indictment of the accused and the members of the acquitting tribunal for perverting the course of public justice. Under the circumstances of the case before us, there can be no limitation of the principle I have mentioned.

The object of the application for a writ of *certiorari* and *mandamus* in this case is to deprive the defendant of the benefit of his acquittal, and to have him tried again for the offence in reference to which he has been acquitted. If, in the exercise of our discretion—for the granting of the writ rests, subject to certain limitations, in our discretion—we quashed the order of dismissal, we would deprive the defendant of the *status* of a man innocent of an offence in respect of which he was charged; and, if we sent the case back to the magistrates, it would be only on the basis that the case could be reheard, though the law says that no man shall be tried twice for the same offence. The application is without precedent or legal sanction.

But let me take the ground mentioned in the conditional order, viz. that the justices acted without, and in excess of, jurisdiction, and let me for the moment deal with this ground of impeachment as not including in it an imputation of bias. This ground of impeachment is, in my opinion, wholly unsustainable. The bench consisted of five magistrates, and four of them, who have made affidavits, tell us they were of opinion that the evidence did not warrant a conviction. In acquitting I cannot conceive how they acted without, or in excess of, jurisdiction. The charge was concededly within their jurisdiction. It was properly laid. They heard all the evidence that was offered, and the order made is appropriate in form. The magistrates had, according to the contention at the bar, jurisdiction to convict; but, it is alleged, though they had jurisdiction to convict they had no jurisdiction to acquit. This ground of impeachment cannot be sustained.

However, this is not the ground really pressed by Mr. Ronan. What he pressed with so much energy was the objection on the ground of alleged bias on the part of Lord Macnaghten. I will deal with this ground of objection. It is not, as I have already shown, included amongst the grounds mentioned in the conditional order, nor in the affidavit upon which the conditional order was founded is there any specific allegation as to any of the magistrates being interested or influenced by bias. It is true there is the allegation that Lord Macnaghten had, prior to the hearing of the summons, trespassed himself on the *locus in quo* in assertion of a right of way, but the ground upon which the adjudication of the magistrates was specifically arraigned is stated in the fourth paragraph of the affidavit—namely, that, "when the plaintiffs' case had closed, Lord Macnaghten, who was acting as Chairman of the presiding Justices, stated from the bench that he believed there was a right of way along the particular place in question, and that the defendant had gone there in the exercise of that right, and that the bench would dismiss the case." Now, this is the leading statement in the affidavit upon which the application was founded, and it comes to this, that at the close of the complainants' case Lord Macnaghten stated his belief both as to the existence of the right of way and as to the purpose for which the defendant went to the place in question; and that then and there he made a ruling dismissing the case on the merits. It would appear from this that there was no discussion at all between the time Lord Macnaghten referred to the alleged right of way and the pronouncing of the order made, whereas it is absolutely plain from the affidavits that a long interval elapsed between Lord Macnaghten's question with reference to the existence of a right of way and the pronouncing of the final order. During this interval Lord Macnaghten, according to his own statement, was in vain endeavouring to extract information as to their legal position from the representatives of the complainants. The affidavit grounding the application did not state the facts at all as fully and explicitly as I would have desired. I am satisfied that Lord Macnaghten did not state that in his belief the defendant was crossing the place in question in exercise of a right of way. I am satisfied that Lord Macnaghten simply asked was there not a right of way across the particular place; and I desire to add that, in reference to that question, he was not met with a desirable explicitness. If he had any special knowledge with reference to the existence of a right of way, he was not only justified, but bound to make the inquiry he did make. A Judge cannot, of course, act upon his own oral statements as to matters of fact in a case he is trying, but it is a matter of the most elementary learning that Judges every day, both in England and Ireland, ask questions suggested by their special knowledge, whether local or scientific.

But, to return to the main, practically to the sole ground of impeachment of the action of the magistrates,—namely, the ground of bias on the part of Lord Macnaghten—in my opinion the Company is precluded from relying on any such ground. It is uncontradicted that Dr. Traill pressed Lord Macnaghten to remain to hear the tramway cases. These cases included the very one now under discussion. It is manifest from the affidavit of Mr. William Traill, from that of Dr. Anthony Traill, from the correspondence referred to, and indeed from the affidavit of Lord Macnaghten himself, that a public right of way had been claimed by Lord Macnaghten across the very place where Love, the defendant in the summons, was alleged to have trespassed; and, notwithstanding that, Dr. Traill pressed Lord Macnaghten to remain and adjudicate with the other magistrates upon the case. Dr. Traill states that he did not anticipate that the question as to a public right of way would arise during the progress of the case; but it had arisen before, and the point of alleged trespass by the defendant Love was in the very place where the public right of way had been claimed by Lord Macnaghten. If it was not present to Dr. Traill's mind that this question would arise, it most certainly ought to have been present to his mind. Undoubtedly the law regards with great jealousy the action of a magistrate in continuing to act in a case which has developed a question as to the existence of a right of way which he himself had claimed both on behalf of the public generally and on his own behalf as a member of the public, and in the maintenance of which he had actually proceeded to the place where the right of way was alleged to exist, and walked upon it with a view of challenging legal proceedings against himself, that he might, by the opportunity afforded by such proceedings, maintain and successfully assert in his own person the right claimed. The law which desires that its administration should be above the appearance of even unconscious bias would scrutinize with great jealousy the action of a justice in exercising magisterial functions in such a case, but certainly the Company, who, through their representative, pressed Lord Macnaghten to sit and adjudicate, cannot rely upon any such ground of objection.

In the case of *Reg.* v. *Cheltenham Commissioners* (1), where a similar question arose, Lord Denman, in giving judgment, said—"If there be anything like a consent, or if the magistrate take a part on being desired to do so by all the parties, it would be monstrous to say that the presence of the magistrate vitiated the proceedings." Such is the language of that great Judge, Lord Denman. Here there was not merely consent; there was pressure; and that, when Lord Macnaghten manifested a desire to leave the bench. Viewing what took place in the light of common sense, it appears clear to me that Dr. Traill pressed Lord Macnaghten to sit, because he believed him to be a just and upright and impartial magistrate as well as a most distinguished lawyer, and that Lord Macnaghten consented to sit because he was wholly unconscious of any prepossession or opinion which would in any way derogate from the most sensitively conscientious discharge of his magisterial duty. It is true that as the proceedings progressed in this Court,

(1) 1 Q. B. 467.

as affidavits were being filed, an element of considerable heat was developed. Lord Macnaghten felt himself, no doubt conscientiously, compelled to arraign the action of the Company in pressing a second charge against "the absconding pauper," Love, who had already been convicted; and Dr. Traill, when the *bona fides* of the Company was impugned, unhappily forsook that calm—that philosophic calm—which is characteristic of those academic precincts of which he is an ornament, and suffered himself—I say it regretfully—to be betrayed into making grave and unwarrantable imputations. Dr. Traill tells us himself that he asked Mr. Boyle, one of the magistrates who had taken part in the decision, how he came to assist Lord Macnaghten in getting what was practically a decision in his own favour on a point in dispute between him and the Company. The imputation conveyed by this question, whether made in a frivolous spirit or in a serious spirit, is, in the opinion of each member of the Court, wholly unwarrantable and unfounded, and, in my opinion, wholly unworthy of Dr. Traill, of his vigorous intellect, and his better self.

This motion for a *certiorari* is unsustainable on all grounds, and must be refused with costs.

O'BRIEN, J.:—

I consider it as impossible in law to have a *certiorari* in the case of a dismiss on the merits, as to try a man again for murder who has been acquitted. There is no distinction whatever in principle between the two cases, in my opinion; and I cannot allow that the rule admits of any exception from any cause whatever, from fraud, corruption, duress, or even force by the party accused. The decision is the final stamp and result, in which all question of the means is obliterated. The nature of the proceeding on *certiorari* alone proves it. Suppose a *certiorari* granted. The order is quashed. What happens next? In a conviction the result is changed. In the case of dismissal of the complaint, there is no change, the state of things remains as before. The Court cannot assume an initiative of new complaint. It cannot order the justices to convict, for the simple reason that, though all the conditions of criminal liability may be found in the evidence, they may disbelieve the witnesses;

and that is a power which cannot be taken from them, or with which we can invest ourselves. It is not like a "Case Stated," where there is no act of final judgment, but it abides, or is expressly made subject to, the direction of the Court. So that by *certiorari* in the case of a dismiss the Court would simply blot out the judgment of the justices, and put nothing in its place. The whole proceeding therefore ends in palpable absurdity. Accordingly, no instance has been produced of a *certiorari* having been granted for an acquittal from the beginning of time to the present. But the matter does not rest merely upon the technical nature of *certiorari*, nor is the principle exhausted by the rule *nemo bis vexari debet*, because that is common to civil cases. Another element comes in—the ground of constitutional law, following the necessity of natural law. An acquittal by a tribunal of whatever degree is a judgment *in rem*, a judgment of personal *status*. The law takes off the hand of restraint from the accused, delivers him back into the condition of natural liberty, and seeks not to lure the bird from the air that has once left the cage. This principle is the very essence of the law of England as to personal condition, and tolerates absolutely no inconsistency with it. It is recognised as to summary proceedings by the provision of the Petty Sessions Act, which forbids an appeal from a dismiss except in civil cases, and that is a stronger instance than *certiorari*, because upon appeal the credit of the witnesses does not withdraw the case from review. In short no question is possible after a dismiss or acquittal but the identity of the person and the charge. The motion for a *certiorari*, therefore, obviously and certainly fails. And the matter that appears to me to present the greatest embarrassment is how far we are justified—for determining the subject of costs, which in this instance are less material to the parties than usual, except as assumed to express a judgment on personal conduct—in entering into the controversy raised by the affidavits as to the proceedings at sessions, which strictly cannot affect the question of costs at all. Costs must always depend upon the question which of the parties has unnecessarily occasioned the expenses of the litigation. That necessarily involves the answer, Where the proceedings can in law have no result; and that was capable of being known beforehand. The objection on which this order must be discharged is one that existed from the first, that the parties had the means of judging of, and that could not be affected by affidavits or any evidence concerning the proceedings at sessions. I can of course understand a reason in the mind of the Company for the motion, if we were to dismiss the influence of personal feeling, that the second case having been dismissed upon an express assertion of a right of way, and that by a person of great authority, they considered their interests would be compromised by the result. Even in this view, if well founded, there is a distinction between the effect of a dismiss and of a conviction as evidence on disputed questions of way; for the complaint of trespass being general, and always requiring evidence to explain it, the dismiss may be consistent with many causes which would prevent it having any effect in evidence on the disputed right, which is not the case with the conviction; and in this instance at all events one would be neutralized by the other. The necessity that will excuse a person from costs must be an advised and real necessity, and not a mistaken impression, however natural.

In this case the whole proceeding is erroneous, and for the purpose of the function of which the Court has to acquit itself, the whole evidence on both sides may be considered as entirely thrown away. Nevertheless, it would be a strange though perhaps not infrequent form of injustice, if a person could make an application to the Court untenable in law, accompanied by statements of a highly injurious character—in this instance affecting the impartiality in a judicial position of an eminent person, one of the supreme arbiters of the law of the whole empire—and if an opportunity were denied on technical grounds to the person assailed of meeting these imputations; the Court in that case must listen to the charge, and yet would not listen to the vindication! And no one can reasonably say that it would have been consistent with the dignity and position of Lord Macnaghten to have been satisfied with a legal objection to the application, however fatal, and leave himself open to the suspicion of implied acquiescence in the statements concerning him, to which therefore we are not absolved from the necessity of adverting.

Now the case made by the affidavit on which the motion was grounded was not that of causes of bias existing in the mind of

Lord Macnaghten which amounted to a disqualification, and which by the rule of law is wholly unaffected as an objection by the question whether it affected the result of the proceedings; as it is no less certain in fact that Lord Macnaghten's sense of personal dignity and of the duty of his great position would have raised him quite out of reach of any such imputation. Such a case could not have been put forward as the ground of the motion, for the simple reason, not disclosed in the affidavit, but afterwards appearing, that Lord Macnaghten was requested to act on the occasion by Dr. Traill himself. If that had been the sole question, and were not certainly excluded by the act of the party prosecuting himself, I would have had much difficulty, on a question which from its own nature necessarily gives rise to varying measures of judgment, in declaring that there was not evidence which would bring the case within the category of those circumstances that constitute bias in point of law. Mere expression of opinion, however strong, has not that effect. Still less can bias be deduced from a general feeling (in which Lord Macnaghten would be found not to differ from the whole community) that it is the tendency of railway companies, under the ever present influence of interest, and from having no sense of personal responsibility, to make little account of invasions of public right. The possibility of bias is found frequently to be distinguished in the decisions from actual bias, as not sufficient to invalidate any legal proceeding. That is the kind of bias that arises out of the contingency of danger or advantage to the interest of a class or an individual. But I consider it to be a true expression of the principle of law, that any state of facts which segregates a person by his own act from the general public in assertion of a public right, constitutes in law the kind of bias that affects judicial qualification. Now without adverting to the correspondence, as to which I am uncertain, from the opportunity we had of hearing it in Court, whether it referred to the specific part of the alleged right of way, it is undisputed that Lord Macnaghten did himself go upon the place in question, avowedly with the object of inviting the Company to make him an adverse litigant in the defence of what he considered the public right. In that course he assumed a position distinct from the rest of the community, such as identified him in a particular and special manner with one side of the question, and that is the single point that appears to me to make out the case of bias. The principle owes its origin to suspicion, and suspicion has in like manner exercised an influence in the tendency of the authorities to extend and not to contract it, and I consider it would be dangerous to lay down any limitation that would exclude the present case from its application, in view of a very different class of cases that may arise. On the other hand, it is absolutely certain that no one entertained the least idea of Lord Macnaghten's having any bias that would affect him, and that it is not open to his opponent to complain, having been himself the person that asked him to act; and I should say this was the cause that prevented such a case being made upon the affidavit, and likewise that restrained Dr. Traill from making any remonstrance—as I certainly find no difficulty in accepting his assurance he would have made, when he found the decision was against him. Having requested the assistance of the Judge, he was in a difficulty to repudiate the judgment. And it appears to me not quite easy to reconcile the evidence now presented to show that Lord Macnaghten was a partisan on the question of the right of way, with the fact that he was requested to take part in the hearing of the case, unless it was that the question was quite unexpected, or unless it be that we are cast upon the alternative—which was presented to the mind of Lord Macnaghten by the want of explanation of the second case going on—that this was a contrivance by the Company to obtain, in a proceeding against a helpless person, a decision that was capable of being used upon the right of way, in the presence and with the aid of their chief opponent—a circuitous and refined design which it would be difficult to credit even if Dr. Traill could be supposed to be indifferent to the distinction between him and his friends.

There was, besides, another and ordinary reason alleged for the prosecution in the name of the Company—to remove a vagrant, a human nuisance as they may have considered him, from the line, and to remove him perhaps for a longer time by a second term of imprisonment. It may be that his constant trespass was an inconvenience to the railway—this celebrated line from Portrush, that has the honour of having given the lead to the great scientific revolution now spread over the world—or that his life was in danger, so as to require the tram to be frequently stopped. But a Judge might have considered this persecution. He might have thought one conviction and one period of confinement enough for the offence of a forlorn creature wandering upon the vacant ground near a railway. Above all, the habit of justice and of his profession would have made him more vigilant in the case of a defendant who was not present—of a person so helpless that he was scared away by the service of the summons. I fail to discern in the account of the proceedings at what point it can be suggested Lord Macnaghten was called upon to give effect to any obligation existing against him on account of his opinion concerning the right of way, or by what vigilance or circumspection on his part he could act otherwise than he did. He was pressed to remain for the cases of the Tramway Company. The first case was disposed of. The point as to the right of way only arose when evidence was given of the place of the trespass in the second case. Was he then of his own accord to leave the Bench and declare his unfitness for the position which he had been requested by the Company to occupy? The discussion lasted but a short time, for it is measured by Dr. Traill's statement that he would have objected to Lord Macnaghten sitting if he knew he was going to raise the question of the right of way. However, in this statement I think Dr. Traill fails to realize the embarrassment of the position he would hold in requesting a magistrate to leave the Bench whom he had himself requested to stay. If the defendant had been convicted he would according to my view have been legally convicted. Even if a question were to arise whether according to Lord Macnaghten's view the Company were required to negative the exceptions, the fact that the defendant was upon the railway for the purpose of crossing was a necessary part of the defence. And though a person who is upon the place over which there is a right of way cannot be challenged as to which way he is going to turn, this was a matter of fact on which the Bench had a right to draw an inference as to whether the defence in law applied, whether he was crossing because he was passing a crossing, where he was coming from, and where he was going. This, however, was not the point that was made on behalf of the prosecution, but that there was no right to go into the matter of the right of way at all; though I would certainly have supposed that the construction put by Lord Macnaghten on the silence of the solicitor as to the reason for the second case being gone on with, and as to an admission of the right of way, did not make sufficient allowance for the embarrassment of his position, challenged as he was by a tribunal of unusual authority, from which he would not have presumed to dissent on grounds of law, and not being quite willing perhaps to avow that the second prosecution was for the convenient and not uncommon object of locking up people in order to put them out of the way; and he certainly was justified in refusing to compromise his clients by making the admission required of him as to such an important matter as a right of way over their railway. Mr. O'Neill made the case that he considered arose upon the facts, without exceeding his authority, which was simply confined to the conduct of the prosecution. But if I had been present myself as a justice, and had been requested, by a member of the Company who had himself properly retired from the Bench, to hear the cases, and had assented to that request, which perhaps is going a very long way in assumption, and then found myself unconsciously made the instrument of what I considered unnecessary persecution towards a poor outcast of society—I am thinking of the solution of the situation, and find it in the language of a bishop I saw some time ago, that a person was bound to take a certain course, but no power on earth would make him do it. No consideration would have induced me to allow myself to be made a party to an oppressive use of the law against such a defendant who was not present. And I consider that it redounds to the honour of the law that, whatever the case was and whatever the discussions and reasons were, it worked round in the end to the issue that indifference to the liberty of the humblest and most forlorn was not found in the most exalted rank of justice.

From the moment the case was stated, it was not possible to have any doubt either as to the decision or the costs.

JOHNSON, J.:—

The conditional order in this case was made, according to the practice of the Court, upon an affidavit, in which the deponent,

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Mr. W. A. Traill, deposed that two summonses against the defendant Love, issued on different days, complaining in similar terms that the defendant had on several specified days been on the railway after warning, came on for hearing at Petty Sessions, before a bench of four local magistrates and one resident magistrate; that the defendant did not appear, and was not represented; that when the first summons was called on for hearing the service of the summons and the offence were proved; and the defendant was convicted and fined 2*s*. 6*d*.; that the second summons was then called on and similar evidence was given. This affidavit then proceeded (paragraph 4):—"No evidence of any sort or kind was given or tendered for or on defendant's behalf, or any question of title raised by him or on his behalf. When the case for the plaintiffs had closed, Lord Macnaghten, who was acting as Chairman of the presiding Justices, stated from the Bench that he believed that there was a public right of way along this particular ground in question, and that the defendant had gone there in the exercise of that right, and that the Bench would dismiss the case on the merits. From this decision the resident magistrate, Mr. Orr, dissented."

On this affidavit alleging those facts counsel, according to the practice of the Court, moved *ex parte* for and obtained this conditional order. The affidavit filed as cause by Lord Macnaghten refers to me, as reported (and I have no doubt reported with substantial correctness), in granting the conditional order on the alleged facts then brought before the Court by affidavit, to have said that "it was a clear case, and that if a Justice wished to become a witness he must take the place of such and not adjudicate on the case." And in paragraph 2 of this affidavit the learned Lord says, "I do most respectfully protest against being condemned unheard and without notice on the *ex parte* statement of any person in the world, even a disappointed litigant." This protest appears to be made under some misconception. No person is "condemned unheard" by the granting of a conditional order grounded on statements alleged on oath to be facts, or by any reasons which may be then stated by a Judge as the legal ground for making the conditional order on the materials before the Court. For my own part, I have been accustomed to give my reasons in open Court for an order which I am called upon to make. In this there is nothing personal, nor is the case prejudged; opportunity is, by the order being conditional and not absolute in the first instance, given to show cause against it. That has in this case been availed of in a manner and to an extent unprecedented in my experience. All suitors are equal before the Court; and, though under ordinary circumstances, I should not have felt called upon to say thus much, yet out of the respect I entertain for the high judicial office of a Lord of Appeal in the House of Lords and for the distinguished position and eminence of Lord Macnaghten, I have thought it right to endeavour to remove what appears to me to have been a misapprehension.

The learned Lord in his affidavit denies that he used the language attributed to him in the affidavit of W. A. Traill, and he is supported in that by Mr. Steen, one of the local Justices at the Petty Sessions. On the other hand the statement in the affidavit of W. A. Traill is supported by the affidavit of his solicitor, Mr. O'Neill, and Dr. A. Traill in his affidavit states that Lord Macnaghten stated that "there was a public right of way there." I am not called on to decide on this conflict of evidence, because I think it is apparent from his Lordship's affidavit that the adjudication at Petty Sessions proceeded on the ground that Lord Macnaghten knew that at the place in question there was a public right of way (although in fact this was a matter in controversy between himself and the Railway Company), and presumably it was also considered by the Justices that Love was there asserting that right. It was Lord Macnaghten who introduced into the case this matter of the right of way which he was asserting against the Railway Company. In his affidavit, after stating his personal knowledge of a public right of way at the place in question, his Lordship proceeds to state what he says occurred at the Petty Sessions. The plaintiffs had proved their case. No objection was made to the form of the summons or to the plaintiffs' evidence. The defendant had not appeared and the plaintiffs' case closed. His Lordship then suggested (and, as it would appear, most reasonably) the withdrawal of this second summons against Love; but Mr. O'Neill, the plaintiffs' solicitor, declined, and his Lordship, who was acting as Chairman of the Bench, says (paragraph 23):—"I said to Mr. O'Neill, Surely that is on the track of the old lane. Is there not a public right of way there?" To this question he received no answer, and he proceeds—"I then said, addressing Mr. O'Neill, 'I wish you would tell me what the case of the Company is? Do they say that there never was a public right of way there or that the right of way if it existed has been duly put an end to and determined, or what really is the Company's case?'" In a previous paragraph his Lordship had stated,—"After the rejection of the Home Rule Bill by the House of Lords I at once took occasion to exercise my right as one of the public to use the said highway across and over the said tramline, in such a manner as to bring the fact to the knowledge of the Tramway Company and its officers"; and Mr. O'Neill, bearing in mind the condition of the matter between the Company and his Lordship, declined to answer these questions or to be drawn into any admissions which might affect the Company's case. And, in paragraph 25, the affidavit proceeds, "I did, as I have already stated, ask Mr. O'Neill whether there was not a public right of way there. No doubt the question was put in a form anticipating an affirmative answer and no doubt the question was suggested by my local knowledge"; and, a little further on, in the same paragraph, "I apprehend that every person in a judicial position is not only entitled but bound to use his special knowledge (be it local or scientific, or whatever it may be) using it of course fairly and in furtherance of justice." The result was that the local Bench dismissed the summons on the merits, the resident magistrate dissenting.

Now if this latter passage of this affidavit means only that a person exercising judicial functions is bound to apply his faculties and knowledge to the evidence adduced before him, this goes without saying, and there would have been no object in putting it in an affidavit; but if it means, as it may mean, and it was so dealt with in the argument, that a person in a judicial position is entitled to adjudicate on his own unsworn statement or on his own private knowledge or belief, then I respectfully differ from that position. The law, as I understand it, is that a person exercising judicial functions is not justified in noticing directly or indirectly by statement or otherwise facts within his own private knowledge. He ought to be sworn and state them as a witness. Summary jurisdiction is the creation of statute, and its administration (except where otherwise specially provided for) is governed by the Petty Sessions Act. The complaint and the defence (if any) must be proved by legal evidence, and such evidence, whether before or since the Petty Sessions Act, must be on oath or affirmation, and ought to be subjected to the test of cross-examination if required. In *Plowden*, 83a, and 1 *Leonard*, 161, it is said, "when the King," Henry IV., "demanded of Gascoigne, J." (afterwards the famous Chief Justice), "if he saw one in his presence kill J. S., and another that was innocent was indicted for it before him and found guilty, what would he do in such a case? and he answered that he would respite judgment because he knew the party was innocent, and make further relation to his Majesty to grant his pardon; but there he could not acquit him, and give judgment of his own private knowledge." That was in the 7th of Henry IV. In the Reports of Kelyng, C.J., p. 12, it is stated, "Memorandum, that Secretary Morris and Mr. Annesley, President of the Council, were both in Commission for the trial of the prisoners, and sat upon the Bench, but there being occasion to make use of their testimony against Hacker, one of the prisoners, they both came off from the Bench and were sworn and gave evidence, and did not go up to the Bench again during that man's trial, and agreed by the Court they were good witnesses, though in the Commission, and might be made use of." In *The King* v. *Anderson* (1680) (1), in pronouncing sentence, the Recorder said, "And now because I will put it out of all doubt, it is not the business nor the duty of the Court to give any evidence of any fact that they know of their own knowledge, unless they will be sworn for that purpose; for though they do know it in their own private consciences to be true, yet they are obliged to conceal their own knowledge unless they will be sworn as witnesses." And coming down to the present times, in the case of *Hurpurshad and Others* v. *Dyal* (2), part of the head note is, "A Judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts." In that case an Indian Rajah had executed a document purporting to exercise a power of alienation conferred by an Indian Statute. On appeal the Privy Council were of opinion on the evidence that this document did not and was not intended to declare a custom, and was not evidence of a family custom. The Judicial Commissioner in India did not rest his judgment on the fact that an agreement had been proved, but on the fact that the document set forth a custom. He referred to his own experience with regard to the veneration in which the Rajah was held, and to his knowledge that the family had recognised a division which, prior to his demise, he had made. But, in the judgment of the Privy Council, p. 286, it is said, "It ought to be known, and their Lordships' wish is to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. . . . If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment as depending on his own knowledge were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness." And Taylor, vol. 2. p. 1173 (8th Ed.), referring in the notes to several cases for his position, in the text says, "So a Judge before whom the cause is tried must conceal any fact within his own knowledge unless he be first sworn; and consequently, if he be the sole Judge, it seems that he cannot depose as a witness though if he be sitting with others he may then be sworn and give evidence. In this last case the proper course appears to be that the Judge who has thus become a witness should leave the Bench and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony or of weighing it against that of another."

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(1) 7 Howell's State Trials, 874. (2) 3 Indian Appeals, 259.

In the present case the alleged right of way was, as I have stated, introduced into the case and pressed by the learned Lord, the Chairman of the Bench, and influenced in my opinion the adjudication; and so far as I have seen the affidavits, it does not appear that Love on the occasion in question was asserting any right of way. I conclude from all the affidavits that he was a deaf beggarman habitually walking along, not across, the Company's land by the railway as a short-cut to the Giant's Causeway (a considerable distance off) where he habitually plied his vocation. I am, therefore, clearly of opinion that a Justice is not justified in adjudicating on his private knowledge; that if he desires to give evidence he must do so as a witness in the ordinary way; and, having done so, ought not to adjudicate in the same case.

But further than this, by the course which the case has taken, the Court is called on to give an opinion on the question of bias. On that point I think the law to be deduced from all the authorities is that if a Justice takes such an interest in a case as to make a real bias reasonably probable he is disqualified from acting as a Justice in that case: as tersely put by Wills, J., in the *Queen* v. *Huggins* (1),—"The question is whether there was a reasonable apprehension of bias." The facts vary with each case, but the test remains constant, and from a perusal of this affidavit of the learned Lord, I can come to no other conclusion than that he did take such an interest (though on public grounds) in the case as to make a real bias reasonably probable; see paragraphs 2, 14, 15, 20 and 26 of the affidavit. Still, however, the order of the Petty Sessions is only voidable not void, as is decided by the House of Lords (2), and W. A. Traill, the prosecutor in the present proceedings, has by his acquiescence precluded himself from raising the question of the constitution of the Petty Sessions Court by which the order was made, or the invalidity of its order, and I therefore think that this conditional order must be discharged.

If the whole facts had been before the Court in the first instance the order would not have been granted. This Court does not set itself in motion on its own initiative in *certiorari*, and the prosecution against Love has been dismissed on the merits by an order of Petty Sessions which is still in force. He was in peril of conviction and punishment on that prosecution, and to quash that dismiss would not be consistent with the legal principle that no man shall twice be put in jeopardy for one and the same offence.

In *The Queen* v. *Russell* (3), the defendant was tried on an indictment for a public nuisance by the erection and maintenance of a certain embankment. This was a charge of misdemeanour and a criminal proceeding. The defendant was acquitted and a conditional order was obtained for a new trial on the ground that the learned Judge at the trial had misdirected the jury and that the verdict was against the weight of evidence. Cause was shown and allowed, and the conditional order was discharged. In his judgment Lord Campbell, C. J., says: "The ground of my decision is that this is a criminal proceeding, and that the defendant ought not to be twice put in peril for the same cause. That rests upon a maxim of English law which will, I hope, always be held sacred." . . . "If there be an improper conviction it should be set aside, but I hope the same practice will never prevail in the case of an acquittal."

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(1) [1895] 1 Q. B. 563, p. 565.

(2) *Dimes' Case*, 3 H. L. C. 759.

(3) 3 El. & Bl. 942.

Now that the whole case is before the Court, I think this conditional order ought not to have been made and must be discharged. But I must add that almost every affidavit which has been filed in this case is in contravention of the 8th Crown Rule, which is identical in England and Ireland and similar to Order XXXVIII., Rule 3, and such form of affidavit (if followed hereafter) will be found to be a very inconvenient precedent in future.

Holmes, J.:—

It is to be regretted that a matter, in its beginning of no importance, has, by the force of accidental circumstances, developed in addition to serious personal issues, at least one legal question of great speculative, if not practical, interest.

The point most confidently relied on as cause against the conditional order is that this Court has no jurisdiction to quash an order of magistrates dismissing on the merits a summons charging an offence punishable summarily. The proposition thus stated may be so interpreted as to amount to a truism; but, without explanation, and especially when taken in connexion with the arguments by which it has been supported, it seems to me to be misleading, if not actually unsound. The maxim, *Nemo bis vexari debet*, is, in my opinion altogether irrelevant. The plea of *autre fois acquit*, or *autre fois convict*, implies a previous acquittal or conviction by a Court of competent jurisdiction.

A verdict of not guilty of high treason by a jury at Quarter Sessions, the dismissal on the merits of a charge of rape by Justices at Petty Sessions, the conviction by a Court-martial for felony or misdemeanour of a person not subject to the military code, would, as far as I am aware, afford no protection to the accused when impleaded before a competent and properly constituted tribunal. Judgments of inferior Courts are quashed by the instrumentality of writs of *certiorari*, not for the purpose of correcting error, but for the purpose of keeping those Courts within their jurisdiction. But, as an order purporting to acquit, as well as an order purporting to convict, may result from Justices usurping or exceeding jurisdiction, it is impossible to draw any logical distinction between the two cases. No doubt there must be a great difference in the application of the principle. For example, there can, I think, be no doubt that, where a Court of Summary Jurisdiction is authorised to entertain a criminal charge, it is always entitled to dismiss it on the merits; therefore the question about which, in *The Queen* v. *Sullivan* (1), there was a difference of opinion between this Court and the Exchequer Division, can never arise when the complaint has been dismissed. Moreover, the circumstances under which a dismiss could be challenged advantageously for want of jurisdiction must necessarily be of rare occurrence. It is the defeated party who applies for a writ of *certiorari*. The defendant is naturally satisfied with the dismissal of the charge; and if the complainant knew, or ought to have known, that the inferior tribunal did not possess the jurisdiction which he invoked, this Court would not assist him to set aside an order for which he was himself responsible.

For these reasons the question is speculative rather than practical; but still it is not difficult to conceive exceptional cases in which it might be of the utmost importance in the administration of justice for this Court to exercise the power which I believe it undoubtedly possesses. I may be permitted to give one or two examples. Instances are to be found in modern legislation of the creation of Courts of Summary Jurisdiction, empowered, subject to specified conditions, to deal with certain indictable offences. These conditions vary in different statutes. They may relate to the existence of an antecedent fact or state of circumstances, to the constitution of the tribunal, to the adoption of a particular course of procedure; but, as a general rule, whatever be their nature, an observance of them is necessary to give jurisdiction. Now, it cannot be doubted that if a Court, purporting to exercise summary jurisdiction thus conferred, but disregarding the conditions attached to it, were to convict, the conviction, even although it could not be lawfully acted on, might be quashed by means of a writ of *certiorari.* Is there any reason, founded on principle or authority, for not giving the same relief on the application of an Attorney-General, anxious to see the law respected, if, under similar circumstances, the proceedings had resulted in an acquittal? No doubt the accused might thus be subjected to another prosecution; and in one sense he was in peril on the first occasion: he might have been illegally convicted, and an illegal warrant of committal might have been executed. But he never stood within the danger of the law. A drum-head Court-martial, a revolutionary tribunal—usurped jurisdiction in any form—is more dangerous to the person proceeded against than the Courts of constituted authority; but the decisions of the former, even when favourable to the accused, cannot be accepted by the latter.

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(1) 22 L. R. Ir. 98, 504.

Let me now take another case. A Court otherwise competent may be rendered incapable of exercising jurisdiction in a particular matter by reason of the bias or interest of one or more of its members. We are often called on to quash convictions on this ground; and, although for the sake of convenience, the precise point is usually specified in the conditional order, the principle that enables us to interfere is that an interested tribunal has no jurisdiction to make an order. But interest or bias does not always run in the same direction. It is possible to conceive that the defendant, not content, as is sometimes done, with canvassing the neighbouring Justices, may seek to influence them by bribes or menaces. I have heard no argument sufficient to convince me that there is no jurisdiction in this Court to quash an order of dismissal so obtained.

Being thus unable to assent to the simple proposition, the acceptance of which would relieve me from further trouble, I am obliged to consider the case in some of its other aspects.

It is unnecessary to examine the affidavits critically, as it is easy to ascertain the actual facts; and I can find no foundation

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for the discreditable imputations made on both sides. I hold that there was no misrepresentation nor wilful suppression in the affidavit on which the conditional order was granted. It tells what happened with substantial accuracy from the point of view of the deponent. I believe that the complainants had no other object in prosecuting than to get rid of a troublesome trespasser, and that the introduction of the right of way into the proceedings was purely accidental. I am sure that Lord Macnaghten acted in complete good faith, and that he had no feeling against the Tramway Company or its directors, but that the persistence of the complainants' solicitor in going on with the second summons, after a conviction on the first, not unnaturally rendered him somewhat critical. In fact, the whole of this unpleasant litigation has arisen from this simple incident. The reason stated for the importance which the Company attached to the second summons was plainly ridiculous, and I do not blame the Bench for suspecting some indirect motive. Now, after the full investigation in this Court, I can see that what influenced Mr. O'Neill and his clients was merely the importance which some people attach to the most trifling matter in which they are personally interested; but I doubt if the Justices were in a position to understand this. As the case presented itself to them, Lord Macnaghten, without, I believe, a shadow of personal feeling, felt justified in using his legal subtlety to defeat an unnecessary prosecution; and the other magistrates were glad to adopt his conclusion, without knowing or caring how he arrived at it. It was, I think, Lord Macnaghten's intention to make "no rule" on the complaint, and the dismiss on the merits was entered either through a misunderstanding or to facilitate an appeal. But, however it occurred, no one was injured by it, and the proceedings might then have been allowed to end. However, as the case is now before this Court, it must be dealt with.

The conditional order is supported on two grounds: 1. That Lord Macnaghten gave evidence himself; 2, that he was disqualified by bias, and therefore that his interference deprived the Justices of jurisdiction. The conditional order was granted, I understand, exclusively on the first ground; but the case has been argued wholly on the second, and, for my own part, I am unable to see how the first can be relied on, except in connexion with, and as evidence of, the other. There may be no better proof of interest, of bias, of the partizan spirit that disqualifies a Judge, than his words and conduct during the hearing of a case; but, apart from this, the effect of a magistrate giving evidence in a matter upon which he is himself adjudicating is not likely to arise as a practical question at the present day, and it has certainly not arisen in the case now before the Court.

I do not wonder at Lord Macnaghten's indignation, when he found in a newspaper report of legal proceedings such an act attributed to him. No one who attaches to language its ordinary meaning, would suppose that what was referred to was merely an ordinary statement of fact, such as falls from every Judge during the progress of a trial. The words imply that he, being one of the Bench of magistrates, came forward as a witness, and, after giving sworn evidence, took part in the judgment of the Court. It is, no doubt, possible to conceive that there exists at present somewhere in the United Kingdom a Justice of the Peace who might do this, although I should be greatly surprised to find him amongst the Lords of Appeal. Strange to say, if it were done by some eccentric Justice, it is far from clear whether even an order of conviction following thereon, could be quashed by this Court. I am not aware that there is any direct authority on the subject, but there are some analogous cases.

It is well settled that a juror can join in the verdict after he has given evidence on oath in open Court. There are several instances of a Peer of Parliament being a witness in judicial proceedings in the House of Lords and subsequently taking part in the judgment. Where a trial takes place before a single Judge with or without a jury there are practical objections to his giving evidence which would not exist if the Court was composed of several members. On the trial of the regicides, two of the Commissioners, one of them the illustrious and high minded Lord Annesley, came down from the Bench and gave sworn testimony, but in this instance, it would appear that they did not resume their judicial functions. It is unnecessary to pursue further a discussion which is purely academic, and I have only referred to it thus briefly to show that, if it ever occurs in a practical shape, there is much to be said on both sides.

But it was not suggested nor conceived that Lord Macnaghten gave evidence in this way. What he did is of daily occurrence in Courts of Justice. During the examination of a witness, he made a statement based upon his previous knowledge for the purpose of obtaining an admission, a denial, or an explanation. It is immaterial whether such a statement is framed affirmatively or interrogatively. In either case it conveys the impression on the speaker's mind and calls for a reply. It is equally immaterial what is the kind of knowledge that suggests the statement. Here it was acquaintance with the locality—a thing to be expected in tribunals of limited local jurisdiction. But it may be the result of the accumulated information and experience which every Judge possesses in a greater or less degree, and which he is bound to use for the purpose of arriving at the truth and effecting justice. The knowledge of the Judge cannot take the place of evidence; but it is employed with the utmost advantage in pointing out difficulties, removing obscurities, and limiting the subjects of actual controversy. I confess I would regard with great misgiving any decision or expression of opinion by this Court that would tend to check the reasonable and honest interposition of Justices either by way of question or affirmative statement. Reticence is often judicious. "A man can hold anything, if he can only hold his tongue," said the Oxford Don when asked how he held his fellowship, when everyone knew he had a wife. But there is a silence that is not honest, and if a Judge thinks he possesses information material to the case he is trying, the fair and candid course is to let the litigants know what is passing in his mind. Evidently this is what Lord Macnaghten intended to do, when he was stopped by what he regarded (perhaps erroneously) as a want of courtesy or candour on the part of the Company's solicitor.

It is, however, unnecessary for me to labour a point which has not even been glanced at by the able counsel who represent the Tramway Company; and I come to what is in truth the only question argued by them, whether the Court was deprived of jurisdiction by reason of the interest or bias of one of its members. It has been argued on this ground alone; and notwithstanding the form and intention of the conditional order, I am of opinion that this point is open. I have no great sympathy with either the spinster-like prudery or the tawdry platitudes with which this proposition of law has been at times laid down for the edification of erring Justices; but I have a thorough respect for the principle itself and I should be sorry to see it narrowed. The kind of interest which a magistrate in common with his neigbours has in the maintenance of a public highway would not in itself disqualify him from adjudicating upon a matter involving the public right; but I agree with Mr. Ronan that he may so identify himself with the litigants or the subject of litigation as to render himself unfit to act judicially in reference to it. I do not think, however, that this was the position occupied by Lord Macnaghten, whose affidavit contains a full statement of all the matters urged against him. The alleged right of way was not the subject of actual or threatened litigation. It was not the cause of the strained relations which some time previously had existed between Lord Macnaghten and the Company. These had arisen on account of the withdrawal from the former of a privilege of a wholly different kind. In the course of the correspondence that ensued Lord Macnaghten incidentally asserted the right; and, when it was denied, he exercised it on one or more occasions; but it was of no practical value to himself or his household, and I can find nothing to suggest that he had any desire to pose as a champion of the public. In fact any interest he took in it, seems to me to have been the interest of a keen lawyer in a nice legal question; and it never occurred either to himself or to the representatives of the Tramway Company that it could be any objection to his adjudicating on the charges of trespass brought against a professional beggar.

Under these circumstances, I am of opinion that there was nothing to prevent his continuing to act as a Justice, even when it appeared accidentally and unexpectedly that one of the alleged trespasses took place at the spot where he had previously asserted the public had a right of way.

Taking this view, I find it unnecessary to consider the effect of Dr. Traill's request to Lord Macnaghten to hear the cases, and his subsequent silence when the question was asked about the right of way. This is a very small point compared with the one with which I have dealt; and I am glad to say that, after the most careful consideration, and applying the rule on which I have always acted in cases of this kind, I have not found it necessary to decide, upon a comparatively unimportant subsidiary issue, a charge of partizanship and disqualifying bias brought against a great lawyer and distinguished Judge. I have thus arrived at the same conclusion as the other members of the Court, although the grounds of my decision are somewhat different.

It will be observed that I have not referred to the grounds upon which Lord Macnaghten held that there ought to have been no conviction. I have refrained from doing so, because this was a matter clearly within the jurisdiction of the Justices, and this Court has no authority to review their decision.

Solicitor for the applicants: *O'Neill.*
Solicitors for the Justices: *Cramsie & Greer.*

A. E. R. J.

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Jan. 19, 20.
Feb. 5.
Appeal.
1895.
Jan. 25.

OLIVER *v.* ROONEY AND OTHERS (1).

(1893. No. 757.)

Landed Estates Court conveyance—Construction—Schedule of tenancies—Map ("and described in the map")—Falsa designatio—*Landlord and tenant—Encroachment—The Landed Estates Court (Ireland) Act*, 1858 (21 & 22 *Vict. c.* 72), *sect.* 61.

J. O., plaintiff's predecessor in title, held, 1, a messuage in the town of Galway, under lease, dated the 7th July, 1793, for ninety-nine years, assigned to him by deed, dated the 6th May, 1858. The lease did not state the acreage, but gave the boundaries in front and on each side, the frontage being on Dominick-street, and granted the premises (two houses) "with the ground rearward" thereof "to the watercourse in the said rear." J. O. also held, 2, in fee, under a conveyance from the Board of Works, dated the 27th September, 1858, for valuable consideration, a piece of land, stretching between said messuage and the Eglinton canal, which had been meanwhile constructed on the site of the said watercourse, and having a width or frontage to Dominick-street of 16½ feet, and a depth along said canal of 123 feet. This was a strip

(1) Before SIR P. O'BRIEN, C.J., O'BRIEN, HOLMES, and MADDEN, JJ.

consisting mainly of land reclaimed or built up out of the "spoil" of the canal. On 2, and a small part of 1, J. O., shortly afterwards, built a house and offices, which, since 1864, had been let to the constabulary, as barracks, at a rent of £42 10*s*.

The defendant, K., by a Landed Estates Court conveyance, dated the 8th August, 1878, was granted three parcels of land in the town of Galway, lot 2 being stated to contain 2R. 33P., "situate," &c., "and described in the map annexed, numbered 1, and thereon coloured yellow, with the appurtenances, which premises do not include, and are not intended to include, any portion of the Eglinton Canal." The map was marked as covering the constabulary barracks, the colouring extending to the actual margin of the canal, and including both 1 and 2. The conveyance was made subject to those tenancies only which were set out in the schedule thereto. The schedule set out two tenancies only referable to map 1, namely, the premises subject to the lease of the 7th July, 1793, stated to contain 1R. 9⅜P., and premises subject to a lease dated 1860, stated to contain 1R. 23⅝P., making together 2R. 33P.

In 1893, on the expiration of the lease of 1793, K. obtained a civil bill decree in ejectment for the possession of the constabulary barracks, as being the premises comprised in said lease, *i.e.* 1. The plaintiff, who had not been a party to these proceedings, now sought to recover possession of the part of the barracks which stood on 2, and for an apportioned part of one year's rent. The Judge at the trial, Palles, C.B., ruled that K., under the conveyance of 1878, had acquired an estate in possession in 2, but that the subsequent possession of the plaintiff, since 1878, entitled her, under the Statute of Limitations, to judgment for possession, the apportioned rent for one year being ascertained at £40. On new trial motion:

Held, that the Landed Estates Court conveyance of 1878 conveyed 2 as land comprised in the lease of 1793, *i.e.* as part of 1, and in effect conclusively made 2 a part of the leasehold, that therefore the Statute of Limitations did not apply, and that the defendant was entitled to judgment.

Per Madden, J.: Where the Landed Estates Court, in the performance of its statutory duties, has ascertained any term of a tenancy, and stated that term—not by way of reference to the lease, but positively—in the conveyance, the lease, though incorporated in the conveyance, and capable of being looked at for other purposes, cannot be used to contradict or modify the statement contained in the conveyance.

Semble, that the facts rebutted the presumption that the land comprised in the deed of 1858 was an encroachment the benefit of which enured to the landlord.

NEW TRIAL MOTION.

The action was instituted, by writ issued the 31st January, 1893, by the plaintiff, Annie Oliver, to recover possession for non-payment of rent, of certain constabulary barracks, storehouses, &c.,

situate in the town of Galway, alleged to be held under a contract of tenancy with the plaintiff at the yearly rent of £42 10*s*. It was tried before Palles, C.B., without a jury, at the Summer Assizes, 1893, for the county of Galway; and, the place of trial having, during the proceedings, been changed to Dublin, the hearing was there resumed and concluded.

The plaintiff's case was that her predecessor in title, John Oliver, held two plots of ground in the town of Galway, adjoining each other. One of these plots was held under a lease of the 7th July, 1793, which had been assigned to him by deed, dated 6th May, 1858. This lease was for ninety-nine years from the 25th March, 1793, and therefore expired on the 25th March, 1892. The premises in this lease were described as "the plot of ground and two new front stone dwelling-houses built thereon by Deborah Haverty, and adjoining each other on the west side of Dominick-street, bounded on the one side by Abraham's mill, and on the other by James Marshall's holding, with the ground rearward of both the said houses to the watercourse in the said rear." The second plot was held by John Oliver in fee-simple, under a deed of the 27th September, 1858, having been purchased by him, for £30, from the Commissioners of Public Works, to whom same had, by deed dated 31st March, 1849, been conveyed by one Bridget Young. There was a map on this deed and the premises were conveyed with reference thereto. This plot stretched between the Eglinton canal (the watercourse mentioned in the lease of 1793) and the said leasehold, and was described in the deed as having a frontage to Dominick-street of sixteen and a-half feet and a depth along the canal of 123 feet. It consisted, as appeared from the evidence, partly of land reclaimed or built up out of the "spoil" of the canal which had been recently constructed along the bed of the old watercourse by the Board of Works, and partly of portion of James Marshall's mill holding which had been acquired by the Board for the purposes of the canal. John Oliver, being in possession of both plots, erected on them—mainly, it would appear, on the freehold premises—certain buildings, now constabulary barracks, and let them in 1864, at £42 10*s*. per annum to the constabulary, who entered into and have since continued in possession of them. These were the premises sought to be recovered.

On the expiration, on the 25th March, 1892, of the lease of 1793, the defendant, Captain C. P. J. Kendall, the reversioner upon said lease, brought a civil bill ejectment to recover the premises comprised therein. This ejectment was not served on the plaintiff in the present action. A decree for possession was obtained thereon, and under this decree Kendall took possession (by attornment of the tenants) of *inter alia*, all the premises set to the constabulary, and entered into receipt of the rents thereof. The defendant Rooney represented the tenants in possession.

The plaintiff's original contention was, that the premises set to the constabulary were part of those conveyed to John Oliver by the deed of 27th September, 1858, and were not comprised in the lease of 1793. It may, however, be taken that this was abandoned at the trial, and her claim confined to that portion of these premises which stood on the freehold.

For the defendant, Kendall, it was contended, amongst other things, that whatever John Oliver got from the Board of Works, was an accretion to the leased premises, as these went down to the river; and that, it having been proved that part, at least of the barracks were included in the leasehold, the plaintiff could in any event be entitled only to the residue; and that therefore ejectment for non-payment of rent would not lie. The main defence, however, was based on a Landed Estates Court conveyance, dated 8th August, 1878, to the defendant, Kendall, which included the premises comprised in the lease of 1793, and also those comprised in the deed of 1858. By this conveyance of 1878, Kendall was granted three parcels of land in the town of Galway, lot 2 being stated to contain 2R. 33P., "situate, &c., and described in the map annexed, numbered 1, and thereon coloured yellow, with the appurtenances, which premises do not include and are not intended to include any portion of the Eglinton canal." Lot 1 comprised premises described in a map coloured red; lot 3, other premises described in a map coloured blue. The map coloured yellow was marked as covering the barracks, the colouring extending to the actual margin of the canal, and including both the leasehold premises and also those comprised in the deed of 1858. The conveyance was made subject only to those tenancies which were set

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out in the schedule thereto; and the only tenancies which could refer to this lot were—1, the premises subject to the lease of 7th July, 1793, stated to contain 1R. 9$\frac{3}{8}$P., and 2, certain premises subject to a lease dated 27th January, 1860, stated to contain 1R. 23$\frac{5}{8}$P. (making together the 2R. 33P.).

The learned Lord Chief Baron held as a fact that part only of the premises leased to the constabulary were included in the conveyances of 31st March, 1849, and 27th September, 1858, and ruled that the defendant, Captain Kendall, was, as between him and the plaintiff, entitled to all the premises which were not comprised in those conveyances; that Captain Kendall, by the operation of the Landed Estates Court conveyance of 1878, acquired a title to the lands thereby conveyed, subject only to the leases mentioned in the schedule thereto; that, as the lease of 1793 did not comprise the premises conveyed by the deeds of 1849 and 1858, the title to so much of those premises as was comprised in the map on the Landed Estates Court deed, was a title in possession, and that same was extinguished by the subsequent possession of John Oliver and those claiming through him and the operation of the Statute of Limitations; and that before the commencement of the action the plaintiff had under that statute acquired a title as against Captain Kendall to so much of the premises let to the constabulary as was included in those deeds of 1849 and 1858.

Leave was thereupon given to the plaintiff to amend by claiming possession of that part only of the barracks which was included in the deed of 1858, for non-payment of an apportioned part of the rent; and, the trial having been adjourned and the venue changed by consent to Dublin, the hearing was there resumed, evidence given of the value of the portion of the premises included in the deed of 1858, and judgment pronounced for the plaintiff for the recovery of that portion, the apportionment of one year's rent in respect thereof being ascertained at £40.

The defendant, Kendall, now moved to change the judgment, or for a new trial.

Nolan, *Q.C.* (*George Wright*, *Q.C.*, and *Staunton* with him), for the defendant.

R. E. Meredith, Q.C., and *Fetherstonhaugh* (*Hynes* with them), for the plaintiff.

George Wright, Q.C., in reply.

[The following were among the authorities cited. On the construction and effect of the Landed Estates Court conveyance, *De Vesci* v. *O'Kelly* (1); *Cusack* v. *Hudson* (2); *Rorke* v. *Errington* (3); *Representative Church Body* v. *M'Quinn* (4); *Middleton* v. *Clarence* (5); *Boyle* v. *Mulholland* (6); *Roe* v. *Lidwell* (7); Madden's Land Judges, Edition 1889, pp. 74, 75. On the question of encroachment, *Dixon* v. *Baty* (8); *Doe* v. *Williams* (9); *Doe* v. *Mulliner* (10); *Doe* v. *Massey* (11); *Kingsmill* v. *Millard* (12); *Andrews* v. *Hailes* (13); *Lisburne* v. *Davies* (14); *Whitmore* v. *Humphries* (15)]. Upon this point Holmes and Madden, JJ., expressed themselves, during the argument, that the facts of the case, especially the fact that the tenant under the lease of 1793 had given valuable consideration for the conveyance of 1858, rebutted the presumption that this was an encroachment for the benefit of the landlord. [Counsel also referred to *Rankin* v. *M'Murtry* (16), on the Statute of Limitations; *Dawkins* v. *Penrhyn* (17), as to pleading the statute; *Irish Society* v. *Tyrrell* (18), and *Tichborne* v. *Weir* (19), as to recovering possession of portion of demised premises. Counsel for the defendant further argued, in addition to the matters dealt with in this report, that judgment in ejectment for non-payment of rent could not be given for a portion of the demised premises; that there was no evidence of possession by the defendants, or any of them, under any subsisting tenancy from the plaintiff; and that an occupying tenant who acquires an interest in lands adjoining the lands held by him as tenant, and who confuses the boundaries by building premises partly on the lands so acquired and partly on the lands so held under lease, cannot set up the Statute of Limitations against his lessor.]

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(1) Ir. R. 2 C. L. 267; Ir. R. 4 C. L. 269.

(2) 4 L. R. Ir. 694; 6 L. R. Ir. 309.

(3) 7 H. L. C. 617; 9 Ir. C. L. R. 357.

(4) Ir. R. 11 C. L. 218.

(5) Ir. R. 11 C. L. 499.

(6) 10 Ir. C. L. R. 150.

(7) 9 Ir. C. L. R. 184.

(8) L. R. 1 Ex. 259.

(9) 7 C. & P. 332.

(10) 1 Esp. 460.

(11) 17 Q. B. 373.

(12) 11 Ex. 313.

(13) 2 E. & B. 349.

(14) L. R. 1 C. P. 259.

(15) L. R. 7 C. P. 1

(16) 24 L. R. Ir. 290.

(17) 4. App. Cas. 51.

(18) 16 Ir. C. L. R. 249.

(19) 8 *The Times* Rep. 713.

Cur. adv. vult.

Feb. 5.

SIR P. O'BRIEN, C.J.:—

The facts of this case, so far as they are material to the question for decision, are stated fully in the report of the Lord Chief Baron. [His Lordship read the statement in the report of the learned Judge, and continued.] These are shortly the facts to which it is here necessary to refer.

There is no doubt that the premises in question were, as a matter of fact, comprised in the deed made to Oliver by the Commissioners of Public Works on the 27th September, 1858, and were not originally comprised in the lease of the 7th July, 1793. The Lord Chief Baron so found, and there is evidence, especially the evidence of Mr. Roberts, to sustain that finding. The Chief Baron, being of opinion that the Landed Estates Court conveyance did not upon its true construction put the premises into the lease of July, 1793, held that the doctrine of adverse possession applied, and that the Statute of Limitations gave a title to the plaintiff. Was the Chief Baron right in so holding? or, to use the words of Mr. Fetherstonhaugh, "Did the Landed Estates Court conveyance put the premises into the lease of 7th July, 1793?" If it did, that lease having expired on the 25th March, 1892, there was neither time nor adverse possession in favour of the plaintiff. The doctrine of adverse possession did not apply; there could be no adverse possession during the existence of the lease.

What then is the true construction of the Landed Estates Court conveyance? In our judgment the Landed Estates Court conveyance does put the premises in question into the lease of the 7th July, 1793. A process of elimination shows this. The Landed Estates Court deed conveys by reference to certain maps; it conveys certain premises as described in the map No. 1, and thereon coloured yellow. The constabulary barracks, the subject matter in dispute, are marked and described upon this map; therefore the conveyance purported to put them in map No. 1, coloured yellow. We see by the body of the conveyance that the area of the premises comprised in that map was 2 roods and 33 perches. Now the conveyance is made subject to the tenancies affecting the premises. Did any tenancies or leases affect the premises comprised on map numbered 1, coloured yellow, and if they did affect these premises, did these tenancies or leases exhaust the whole subject matter, that is to say, the 2 roods and 33 perches? Now all the denominations mentioned in the schedule before the lease of the 7th July, 1793, are, in my opinion, upon the map coloured red. The area of the parcels upon the map coloured red is, according to the body of the conveyance, 2 roods 25¾ perches, a very precise measurement, and the area of the parcels mentioned in the schedule before the lease of the 7th July, 1793, is exactly the same precise measurement. Therefore, I think, without even looking at the contents of the lease of the 7th July, 1793, it is plain upon the Landed Estates Court conveyance that the lease of the 7th July, 1793, is not comprised in the premises on the map coloured red. In fact the map coloured red is exhausted by the premises described in the schedule down to the lease of the 7th July, 1793. So also the other premises mentioned in the schedule after the lease of the 27th January, 1860, exhaust the other map referred to in the body of the deed. We have then by a process of elimination all the premises in the schedule, exhausting, that is to say, entirely covering, the other maps referred to in the conveyance. What then remains in respect of map No. 1, coloured yellow? The premises comprised in the two leases of the 7th July, 1793, and of the 27th January, 1860, mentioned in the schedule. What do we find stated in the schedule as regards them? That the area of one is 1 rood and 9⅜ perches and of the other is 1 rood and 23⅝ perches, making together 2 roods and 33 perches—the precise extent of the contents, according to the body of the deed, of the premises comprised in map No. 1, coloured yellow. Therefore the whole of the map No. 1, coloured yellow, is exhausted by those leases; and therefore, as neither expired until after 1890, the doctrine of adverse possession does not apply. But to pursue the matter further, the premises in the lease of the 27th January, 1860, are so identified by the conveyance, schedule, and map, that the premises in this lease cannot comprise the constabulary barrack; therefore this must be in the lease of 7th July, 1793.

I think this is sufficiently clear without looking at the description of the parcels in the lease of the 7th July, 1793; but, if we look at the description of the parcels and boundaries in the lease of the 7th July, 1793, and at the map No. 1, coloured yellow, I think that what was represented by the conveyance to be comprised in that lease was the whole of the portion on the map No 1, coloured yellow, other than what was in the lease of the 27th January, 1860; and upon this other portion is marked the constabulary barrack.

What then is the legal question we have to determine? The question, according to my view, is what did the Landed Estates Court deed upon its true construction and taken altogether—deed, schedule, and map—do? In my opinion, for the reasons I have stated, it put the constabulary barrack into the lease of 7th July, 1793. Therefore I am of opinion that the verdict entered by the Lord Chief Baron for the plaintiff should be changed into one for the defendant, and that he should have his costs of the action.

O'BRIEN, J.:—

A Landed Estates Court conveyance, in 1878, granted to a purchaser three parcels of land, stated to contain certain measurements, and to be described in maps annexed, coloured red and yellow and blue respectively. At the end of the deed was the usual statement that it was subject to the leases in the schedule. The premises which are the subject of the ejectment are in the part of the map coloured yellow, and are the constabulary barracks mentioned in the map. The schedule, which shows no distinction as to the colour of the map on which the lands are situate, sets out a lease made in the year 1793 to a person named Haverty for ninety-nine years, which therefore expired in the year before last; and in the column for the acreage, the lands comprised in that lease are stated to contain 1R. 9$\frac{3}{8}$P., the whole amount in the part comprised in the map coloured yellow being 2R. 33P.

In the year 1849 certain lands were conveyed by a person named Young, in pursuance of an award, which for some reason was not produced at the trial, to the Commissioners of Public Works, for purposes connected with the drainage of Lough Corrib; and, in the year 1858, the Commissioners assigned a part of the ground so conveyed to them to the predecessor in title of the plaintiff, who was the assignee of the lessee in the lease of 1793; and what is now used as the constabulary barrack was certainly built upon both parts of the land.

On the expiration of the lease of 1793, a civil bill was brought by the purchaser from the Landed Estates Court, and he recovered judgment by default, but no possession was taken thereunder, and the present action, which was tried before the Lord Chief Baron, was brought to recover the premises from him. Upon the trial evidence was given of a kind that might have led a jury to the conclusion, and certainly leads me to the conclusion, that the site of the police barracks was not wholly comprised in the lease of 1793, but that part of it was built on the land acquired from the Board of Works. For one of the boundaries in the lease of 1793 was premises called "Marshall's Mill," and it is undeniable that Marshall's Mill was part of what was conveyed to the plaintiff by the Board of Works, and goes in upon the holding now in question, the constabulary barrack. The Chief Baron held, upon the trial before him, that the Landed Estates conveyance, by its own force, necessarily gave the defendant—representing the purchaser—the whole of the land comprised in the map, but that it had not the effect of making that a part of what was in the lease of 1793, and he gave judgment accordingly for the recovery of that part of the building which was not in the expired lease, but was built upon the portion of the land acquired from the Board of Works. The effect of this view was that, though immediately upon the execution of the Landed Estates Court deed, the purchaser could have recovered the whole land that was in the map, except what was included in the lease, yet, by waiting till the lease expired, he lost that part by the adverse possession of the plaintiff during a period sufficient to be covered by the Statute of Limitations. If the purchaser had proceeded, before twelve years had gone from the date of the Landed Estates Court conveyance, according to this position he could have recovered the new part of the holding, but, by delaying till the full title to the whole fell in, he lost that part—a result somewhat singular, but the necessary consequence of an endeavour to give effect to the deed, and at the same time to preserve another person's property—though it must be observed that the fact of a person building upon land, partly his own and partly held under lease, put the lessor in a position of such disadvantage when the lease was to expire, as rendered the lessee more directly responsible for any result of the confusion. The conflict, therefore, is between the effect of the Landed Estates Court conveyance and the fact of the actual right, as established by the evidence.

The 61st section of the Landed Estates Court Act (21 & 22 Vict. c. 72), so often quoted, says that "every conveyance purporting to pass an estate in fee-simple shall be effectual to pass the fee-simple and inheritance of the land, subject to such charges, tenancies, rights of common, or other easements, leases and under-leases, as may be expressed or referred to therein as aforesaid, but, save as aforesaid, and as hereinafter provided, discharged from all former and other estates, rights, titles, charges, and incumbrances." We have to see how this case is governed by the effect so assigned to the Landed Estates Court deed. First, it grants a rentcharge, and then follows the conveyance of the lands, which is in three divisions; and in the latter branch of the second division occur the words of grant with which we have to deal, and which are as follows:—" And also the plot of ground upon which stand the houses and premises in Lower Dominick-street, and the plot of ground, formerly known as Fahybeg, upon which stand the houses and premises situate in Upper Dominick-street, Fagan's-lane, and Vokes-lane, containing together 2R. 33P. statute measure, situate in the parishes of Rahoon and St. Nicholas, in the town of Galway, and described in the map annexed, numbered 1, and thereon coloured yellow, with the appurtenances, which premises do not include, and are not intended to include, any portion of the Eglinton canal."

I find it stated in the treatise of my colleague, Mr. Justice Madden, on the Landed Estates Court Act (1) that instead of the

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(1) Madden's Land Judges' Practice, ed. 1889, p. 75.

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words "*as described*," which were formerly used in referring to a map, the words "*and described*" have been substituted in practice—manifestly words more precisely adapted to incorporate what is in the map into the specific subject of the grant; and I take it, there can be no question that such is their effect. On the part coloured yellow are written the words "constabulary barracks." Then we come to the schedule, in which the lease of 1793 is set out; and in the column for the acreage it is stated to contain 1 rood and 9⅜ perches. The whole of the two parts coloured yellow is stated in the body of the deed to contain 2 roods and 33 perches; and the other part of what is coloured yellow—and which is completely identified by the boundaries—contains 1 rood and 23⅝ perches, so that the measurement assigned to the lease of 1793, is the exact balance of the whole yellow part. It seems like a child's card-map in which when put together one country fits into another. The two parts in the measurements fit down exactly upon what is coloured yellow, and into each other. As to the argument that we could seek for the lease of 1793 in the red part, that is completely excluded, because the red is already used up to give the 25¾ perches which are the sum of the areas of the other tenancies set out in the schedule before we come to the lease of 1793 at all. I do not agree in considering even the order of the tenancies, as set out in the schedule, with reference to their being applied to the map, as immaterial, any more than would be the order of the clauses of a deed or will upon a question of construction. First, we have the measurement of the whole red part, as stated in the conveyance, entirely disposed of among certain tenancies. Then the deed quits the red and goes next to the yellow; and the part which is the first of the two yellow divisions—and which comes before what is identified by description, and is required to make up the rest of the yellow, and which, with the part so identified by the measurement attached to it in the schedule, does make it up—is the land stated to be comprised in the lease of 1793. Then the deed leaves the yellow and takes up the blue, so that the mere order alone lays down each lease upon the maps, so that they could not be put in a different place; and the leases fill up the maps and leave no part vacant. Besides, the premises are further identified by the exception of the Eglinton Canal, which is in the yellow part alone, and by the fact that they are in Lower Dominick-street, both parts of which description cannot agree with any other subject; and these two descriptions are found in the lease itself, the watercourse at the rear being no doubt identical in its origin with the Eglinton Canal. We have then a certain and distinct grant of land by the map, which is absolutely sufficient to pass it, and admittedly does pass it, without requiring aid from any other description; and we have the lease put into that grant, and, by the measurement, occupying the whole of it, and leaving no space vacant on which the deed can operate. Can the deed therefore convey it otherwise than as land comprised in the lease?

Now, it is argued that, while the Court is required to ascertain tenancies and to serve notices on tenants and adjoining owners (which by the 85th section must be taken to have been done), it is no part of its duty to ascertain or state measurements, and that, therefore, the conclusiveness attributed by the statute to the deed cannot be extended to such statements. That is true, but the schedules are part of the deed, and, like part of any other deed, cannot be rejected in construing and applying it; and, while the parties are not concluded by the statement of matters outside the statutory duty of the Court, the measurements, making up the total of what is in the map, are, as Mr. Justice Madden observed in the argument, an express statement that the leases exhaust the whole land, and that there is not any part in possession that is not subject to them.

Now let us turn the question the other way, and see if we can derive any light from what would happen if, immediately after the Landed Estates Court deed in 1878, an action were brought by the defendant to recover the part which is now alleged by the plaintiff to be outside the lease. Could he succeed, against the statement in his own deed, that there was a lease outstanding which contained the quantity of land in the schedule; or could he refer to the lease to show it contained less, and to prove that what he got was not the fee-simple subject to a lease, but the reversion on the lease with other land in fee-simple? Or would the difficulty in the inverted position of the parties still remain the same? The holding of the latter view in the present case would result in a kind of legal wrong. For the purchaser, putting the construction on his deed that any ordinary person would do, and giving the tenant the benefit of fifteen years' longer occupation than it is said he need do, in the belief that the tenant had a right to it, is told at the end of the lease, that he ought to have looked sharper and known that two rooms in a house were his, before he was caught by the Statute of Limitations. What is the position of the purchaser who deals with the Landed Estates Court? He goes into Court, and sees, as we may suppose, the rental. He knows nothing of old leases that are buried in the vaults. He pays his £6000, carries away his deed, and knows he has got what is coloured yellow on the map. Of course he never dreams of such a thing as one end of a house being built on one title and the other end on another title. The whole is on his map. He is told that (most certainly by the measurement) all is included in the lease, and he knows that he cannot touch the place during the lease; and when he comes to look for his property at the end of the term, he finds himself wrangled out of his reason by making out, not that black is white but that yellow is red, no less to his surprise than if he were wrangled out of his personal identity. In *Rorke* v. *Errington* (1) the House of Lords went so far as to lay down, in order to maintain the deed, that they would presume the lease was omitted altogether from the schedule by the consent of the tenant. That was going an extreme length because the consent in the 85th section would appear not to be such a thing as consent to the extinction of an interest. How are we to know but the deed was drawn in its present form by consent or design? How are we to know but the plaintiff's predecessor preferred to take with the term of the lease as covering the whole house, rather than, by insisting on an adverse title, expose himself to eviction from part of it immediately upon the execution of the conveyance in 1878? How are we to declare that it was not the judgment of the Landed Estates Court that the conveyance from the Board of Works was an encroachment, as has been contended in the present argument? And are we to construe the deed in the mode which would make the quality of the possession since 1878 adverse, instead of consistent with the express terms of the instrument? Through all the decided cases such as *De Vesci* v. *O'Kelly* (1), in which the recitals of the schedules have come in conflict with the terms of the lease, and in which it was held that the latter could be referred to in order to correct the errors in the former, a common principle runs that it was a question as to the incidents of the tenancy; but in no instance was the correction such as went to contradict the direct specific physical grant of the land itself. There is therefore no account that can be given of the conveyance in 1878 which is not inconsistent with the actual grant, except that it is an express adjudication that the lease of 1793 contains what is in the map, and that on its expiration the whole land returned to the purchaser.

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(1) 7 H. L. C. 617; 9 Ir. C. L. R. 357; 6 Ir. C. L. R. 279; 5 Ir. C. L. R. 542.

I am therefore of opinion that we are bound to obey the supreme and imperative policy of the statute, so often held to be paramount to every kind of irregularity, by holding that the whole of the land was comprised in the lease, and, on its termination, fell into the hands of the purchaser; and therefore that the verdict ought to be changed, and the judgment entered for the defendants.

HOLMES, J.:—

I concur.

MADDEN, J.:—

It appeared to me throughout this case that the only question for discussion was the identification of the premises comprised in the lease of 1793, with a portion of the premises comprised in the map coloured yellow. This being established, the conclusion is inevitable; for it is quite plain that the conveyance states distinctly that the entire of the yellow lot is comprised in this lease and the lease of 1860.

It is true that a lease referred to in a Landed Estates Court conveyance is taken as incorporated in the conveyance, and is to be read together with it for the purposes of construction. But this is subject to the governing principle laid down by all the Judges in the case of *De Vesci* v. *O'Kelly* (1), quite as strongly by Pigot, C.B., who agreed with the majority of the Judges in the Exchequer

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(1) Ir. R. 2 C. L. 267; Ir. R. 4 C. L. 269.

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Chamber, as by Lawson, J., who dissented. That principle I understand to be this—that where a lease so incorporated with the conveyance by reference, is in conflict with the conveyance of the Court, the latter must prevail. I do not think that this principle can be confined to statements in the conveyance dealing strictly with the grant of land; and it is only in this particular that I think it necessary to qualify my adoption of the statement of the law upon this matter which has been delivered by my brother, O'Brien. In my opinion, whenever the Court has, in performance of its statutory duties, ascertained any term of the tenancy, and stated that term in the conveyance, positively and not by way of reference to the lease, the lease, although incorporated with the conveyance, and capable of being looked at for other purposes, cannot be used to contradict, alter, or modify in any respect the statement contained in the conveyance. In the present case the conveyance, of which the schedules form part, clearly states that the entire area of the yellow plot is subject to the two leases to which it refers, and this statement is, in my opinion, absolutely conclusive (1).

Appeal.
1895.
Jan. 25.

The plaintiff appealed to the Court of Appeal (Walker, C., Porter, M.R., FitzGibbon and Barry, L.JJ.), who affirmed the decision of the Divisional Court.

G. Y. D.

Solicitor for the plaintiff: *R. W. Peebles.*
Solicitors for the defendant: *Blake & Kenny.*

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(1) Mr. Griffin was the Reporter in attendance in the Queen's Bench Division.—A. E. R. J.

Ex. Div.
1895.

June 28.

MANLY *v.* YOUNG (1).

(1894. No. 4589.)

Rating — Township Commissioners — Urban Sanitary Authority — Public Health (Ireland) Act, 1878 (41 *&* 42 *Vict. c.* 52), *ss.* 226, 227—*Towns Improvement (Ireland) Act,* 1854 — *Special Act — Limit on rate.*

Town Commissioners, acting under a special Act, which incorporated the Towns Improvement (Ireland) Act, the Gas Works Act, 1847, and certain provisions of the Water Works Clauses Act, 1847, were also the Sanitary Authority of the township. The Special Act provided that the Township rate should not exceed in any year 2*s.* in the £ without the consent of two-thirds of the ratepayers at a special general meeting. The Commissioners, without the prescribed consent, made a Township rate of 2*s.* 6*d.* in the £, not only for sanitary purposes, but for all the purposes of the Special Act.

Held, that the rate was bad.

Special Case, as follows:—

1. The plaintiff is the clerk and secretary of, and sues on behalf of, the Township Commissioners of the Pembroke Township, in the city of Dublin, who were constituted by a special Act of Parliament, 26 & 27 Vic., c. lxxii., the short title of which is the Pembroke Township Act of 1863. By the 4th section of the 41 & 42 Vic., c. 52 (The Public Health (Ireland) Act, 1878), the plaintiffs are constituted the Urban Sanitary Authority of the Pembroke Township.

2. This action has been brought by the plaintiff as such clerk and secretary of the Pembroke Township to recover the sum of £22 1*s.* 9*d.* for rates due by the defendant to the plaintiff, the particulars of which, as appearing on the writ of summons, are as follows:—

(1) Before Palles, C.B., and Andrews, J.

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To amount due by defendant to the Pembroke Township Commissioners for Township rates, payable in respect of certain premises the property of the defendant, viz. 2, 4, 6, 8, 10, 12, Thomas-street, Ringsend, within the said Pembroke Township, and duly assessed by the said Pembroke Township Commissioners on date in margin, for the year 1893, viz.:—

Pembroke Township Rate, 2*s.* in the £ on rateable annual value of premises (£47 15*s.* 0*d.*),	£4 15 6
Pembroke Township Water Rate, 9*d.* in the £,	1 15 10
Pembroke Township Sinking Fund, special rate, 11*d.* in the £,	2 3 9½
Pembroke Main Drainage Rate 10*d.* in the £,	1 19 9½
	£10 14 11

To amount due by the defendant to the Pembroke Township Commissioners for Township rates payable in respect of the aforesaid premises, and duly assessed on date in margin for the year 1894, viz.:—

Pembroke Township Rate,	2*s.* 6*d.* in the £	
Do. Water Rate,	0*s.* 6*d.* in the £	
Do. Sinking Fund, Special rate,	0*s.* 11*d.* in the £	
Do. Main Drainage Rate,	0*s.* 10*d.* in the £	
	4*s.* 9*d.* in the £	
On valuation, £47 15*s.* 0*d.*, as above,		11 6 10
Total,		£22 1 9

3. The defendant is rated pursuant to section 64 of the Towns Improvement Act of 1854, which is incorporated in the Pembroke Township Act of 1863, in respect of the houses and premises 2, 4, 6, 10, 12, and 14 Thomas-street, Ringsend, of which he is the owner. The said houses and premises were at the time of the striking of the rates in the writ of summons mentioned let in separate apartments to weekly and monthly tenants of the defendant, and he was then in receipt of the rents and profits of such tenancies.

4. The defendant disputes so much of the plaintiff's claim in respect of the rates of 1894 as consist of "The Pembroke Township Rate" on the ground that said rate is made under the

power in that behalf given by section 46 of the Township Act of 1863; and by that section it is provided that the Pembroke Township rate shall not exceed 2*s.* in the £ in the whole in any year without the consent of at least two-thirds of the ratepayers qualified to vote for Commissioners present at a special general meeting convened by the Commissioners by at least 14 days' public notice, expressing that the meeting is to consider the propriety of making an increased rate, and by which it is further provided that the Pembroke Township rate shall not in any case exceed 2*s.* 6*d.* in the £ in the whole in any year. And the defendant contends that, the limit of 2*s.* in the £ having been exceeded in respect of the Pembroke Township rate for the year 1894 (which is 2*s.* 6*d.* in the £) without such meeting of ratepayers being called to sanction same, the entire of said Pembroke Township rate is void and of no effect.

5. The plaintiff submits that by reason of the provisions hereinafter mentioned, the said provision in section 46 of the Pembroke Township Act limiting the amount of the Township rate has ceased to have any operation or effect. By section 226 of the Public Health Act, 1878, it is provided that all expenses incurred or paid by the Urban Sanitary Authority in the execution of that Act, and not otherwise provided for, shall in the case of an Urban Sanitary Authority being Commissioners under a local Act, be defrayed out of any rate leviable by them as such Commissioners throughout the whole of their district, and by section 227 of the same Public Health Act it is provided that any limit imposed on or in respect of any rate by any Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by the Sanitary Authority of any urban sanitary district for sanitary purposes. By section 2 of the Public Health Act "sanitary purposes" are defined to mean any objects or purposes of the Sanitary Acts, and by the same section "Sanitary Acts" are defined to mean certain Acts therein mentioned, and amongst others the Towns Improvement Act of 1854, and with respect to any urban sanitary district are defined as including any Act or local Act relating to the same subject matters as the Acts therein above mentioned in force within the district. The Pembroke

Township Act of 1863 relates to the same subject matters as the Towns Improvement Act of 1854 and others of the Acts in said section 2 mentioned; and the plaintiff therefore submits that the Pembroke Township rate is a rate levied for the purpose of defraying expenses incurred for sanitary purposes within the meaning of the foregoing provisions of the Public Health Act, and that the limit imposed by section 46 of the Pembroke Township Act does not now apply to said rate. A copy of the assessment of the Pembroke Township for the year 1894, dated 2nd February, 1894, is set forth in the schedule hereto.

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IMPROVEMENT RATE, 1894, AT 2*s*. 6*d*. IN £.

EXPENDITURE.

ROADS—Materials, Labour, &c., ...	£3600	0	0	
Pathways, Kerbing, Crossings, &c., ..	300	0	0	
Horse Account, ...	400	0	0	
Carts and Implements, ...	200	0	0	
LIGHTING—Gas, £950; Wages, £260; Repairs, £40, ...	1250	0	0	
ADMINISTRATIVE CHARGES—Salaries, Collectors' Fees, ...	1000	0	0	
Repairs, Rent, Taxes, Insurance, Fuel, Gas, &c.	300	0	0	
Printing, Stationery, Advertisements, &c.,	200	0	0	
Election Expenses, ...	30	0	0	
Law and other Costs, ...	200	0	0	
Brigade Horsing, &c., ...	200	0	0	
County Cess, ...	2600	0	0	
Weights and Measures	80	0	0	
Irish Education Act, ...	100	0	0	
Maintenance of Sewers, .. .	250	0	0	
Sanitary Officers' Salaries, Inspectors' and Disinfectors' Wages, ...	200	0	0	
Expenses of Morgue, ...	20	0	0	
Contributions to Hospitals, ...	200	0	0	
Registration of Parliamentary Voters, ..	200	0	0	
Retiring allowances, ...	250	0	0	
Disinfectants, Food Samples, Expenses under Disease Notification Act, ..	50	0	0	
Cholera Precautions, ...	100	0	0	
Technical Schools, ...	420	0	0	
Retention Concrete Contract	285	9	0	
				£12,435 9 0

IMPROVEMENT RATE, 1894, AT 2*s*. 6*d*. IN THE £.

RECEIPTS.

Government Bounty, in lieu of Rates, ..	£90	0	0			
Probate Duty Grant, ...	600	0	0			
Public Health and other Salaries refunded, ..	100	0	0			
Dog Licenses, ...	60	0	0			
Weigh Bridge Fines, Weights and Measures, &c.,	100	0	0			
Artisans' Dwellings—say	350	0	0			
Outstanding Rates, ...	100	0	0			
Valuation, £101,740, at 2*s*. 6*d*. in the £ ..	12,717	11	3			
				£14,117	11	3
Expenditure, ...				12,435	9	0
Estimated Surplus, ...				£1682	2	3

Bank Balance on 31st December, 1893, say £6000 debit.

(Signed),
R. W. JACKSON.
GEORGE P. CAROLIN.
FANE VERNON.
WILLIAM BECKETT.
CORNELIUS DE GROOT.

Adopted by Board 1st January, 1894.
J. C. MANLY, *Sec.*

6. Pembroke Township rate for General and Sanitary purposes made this 2nd day of February, 1894, at Two Shillings and Sixpence in the Pound on the net valuation of £101,740 10*s*.

Total net value of Property Rateable under this Act.	Amount of First Moiety.	Amount of Second Moiety.	Total Amount of Rate at 2*s*. 6*d*. in the £.
£101,740 10 0	£6358 15 7½	£6358 15 7½	£12,717 11 3

Signed by us this Second day of February, One Thousand Eight Hundred and Ninety-four.

[SEAL.]

(Signed),
ROBERT W. JACKSON, *Chairman.*
A. V. DAVOREN.
FANE VERNON.
GEORGE O. CAROLIN.
CORNELIUS DE GROOT.
J. C. MANLY, *Sec.*

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7. The plaintiff submits that the said assessment is valid and regular in every respect and that the defendant was properly assessed and rated, and is liable for the full amount of said Township rate claimed in said writ.

8. The plaintiff also contends that the said assessment having been duly advertised in accordance with the provisions of the Pembroke Township Act, and the Acts incorporated therewith, and not appealed from by the defendant, became binding and conclusive upon the defendant on the day on which the assessment was signed, viz. the 2nd day of February, 1894 (1).

9. The question for the Court is, whether the plaintiff, having regard to the aforesaid matters and contentions, is entitled to recover from the defendant the disputed item in said writ, viz. the Pembroke Township rate of 1894.

Matheson, *Q.C.*, and *Blood,* for the plaintiff.

The defendant appeared in person.

[The sections of the Acts of Parliament are sufficiently cited in the judgments *infra.*]

PALLES, C.B. :—

The question in this case is whether the Pembroke Township rate for the year 1894 is or is not valid. The amount of the rate was 2*s.* 6*d.* in the pound, and section 46 of the Pembroke Township Act of 1863 provides that the Township rate shall not exceed two shillings in the pound in the whole in any year, without the consent of at least two-thirds of the ratepayers qualified to vote, present at a special general meeting convened in the manner mentioned in the section. It is admitted that there was no such consent.

The plaintiffs insist that the effect of sections 226 and 227 of the Public Health Act, 1878 (41 & 42 Vict. c. 52), is to prevent the provision I have mentioned in section 46 of the special Act having any operation whatever. Section 226 provides that all expenses incurred or paid by an urban sanitary authority in the execution of that Act, and not otherwise provided for, shall, in a case such as the present, viz., that of the urban sanitary authority being commissioners under a local Act, be defrayed "out of any rate leviable by them as such commissioners throughout the whole of their district": a description within which, admittedly, the Pembroke Township rate falls. Then section 227 enacts that any limit imposed on a rate by any Act of Parliament shall not apply to any rate "required to be levied for the purpose of defraying any expenses incurred by the sanitary authority of any urban sanitary district for sanitary purposes." Thus the question here is, whether the rate in question was required to be levied for the purpose of defraying expenses incurred by the Town Commissioners for sanitary purposes.

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(1) This question was not argued, the only point upon which the judgment of the Court was asked by counsel being the validity of the rate.

The estimate upon which the rate was struck is stated in the special case; and although that estimate includes many sums required to be levied for sanitary purposes, such as maintenance of sewers, &c., it admittedly includes large sums for the general purposes of the township, such as repairing roads, lighting, election expenses, county cess, weights and measures, Irish Education Act, registration of parliamentary voters, &c.; and it does not on its face segregate nor show the amount required for sanitary purposes from those required for the other purposes of the township.

The plaintiffs, however, further insist that upon the true construction of the Act, the words "sanitary purposes" in section 227, include all the purposes of the township. This, in my opinion, is an absolutely hopeless contention. It is argued thus: by section 2, "sanitary purposes" are defined to mean "any objects or purposes of the Sanitary Acts." The definition of "Sanitary Acts" follows an enumeration of Acts, such as "Labouring Classes Lodging Houses Acts," "Artisans' and Labourers' Dwellings Act," "Diseases Prevention Act," and "Baths and Wash-houses Acts"; and is defined to mean "all the above mentioned Acts, and the Acts mentioned in the Schedule A, to this Act annexed . . . and with respect to any urban sanitary district includes . . . any . . . local Act . . . relating to the same subject-matters as the above mentioned Acts in force within such district." The Schedule A referred to in this definition is the schedule of repealed Acts, and it contains, *inter alia*, the Towns Improvement (Ireland) Act, 1854, and in the column headed "Extent of Repeal," there is an enumeration of eleven sections of this Act, which it was intended to repeal. Each of these sections is, in strictness, an enactment in reference to sanitary purposes. The contention, then, is that the expression "Sanitary Acts" includes, not alone the specified sections of the Towns Improvement Act, but the entire Act, and thus that all the purposes of the Towns Improvement Act are sanitary purposes. I think it very plain that the "*Acts* mentioned in Schedule A" mean the enactments in the column I have referred to, and are confined to such enactments in the statutes mentioned in such schedule as are stated therein. The subject-matters of the Acts specified in section 2, and in the definition referred to as "the above mentioned Acts" are all sanitary matters. So, too, the subject-matters of the sections specified in Schedule A of the Acts therein mentioned are all sanitary matters; and the third limb of the definition, "any Act, local Act, or provisional order," is expressly limited by the words "relating to the same subject-matters." Thus, the words of the section are in consonance with, and are limited by, the subject-matter and purpose of the legislation. The Act dealt with sanitary matters. It repealed portions of a number of Acts which empowered rates to be made for sanitary purposes, and for those rating powers it substituted those contained in section 226. The combined effect of this section and section 227 was to remove any previous limit in respect of so much of the rate as was required for sanitary purposes; but the previous limits to the rating powers continued so far as it might be necessary to exercise those powers for other purposes.

In my opinion the rate was bad, and the question raised by the special case ought to be answered in the negative.

Andrews, J.:—

In this case, which was stated in pursuance of the order of this division, dated the 6th of November, 1894, leave to set it down for argument, as it was returned by the defendant, having been given by the order of the 11th of June, instant, the question is whether the plaintiff, who sues on behalf of the Pembroke Township Commissioners, is entitled to recover from the defendant the Pembroke Township rate upon his houses, for the year 1894, which was assessed by the Township Commissioners as one entire rate at 2*s.* 6*d.* in the pound. It was not contended in the argument of the case that the rate was conclusive on the defendant upon the ground that he did not appeal against it. The question argued was as to the validity of the rate.

By the 46th section of the Pembroke Township Act, 1863 (26 & 27 Vict. c. lxxii. local), the Township Commissioners are authorized and required, in order to raise money for carrying the several purposes of the Act into execution, in every year to make an assessment, or assessments, under the name of the Pembroke Township rate, upon the occupiers, or in the case therein mentioned, upon the owners of the lands and premises therein mentioned, according to the yearly value therof, so as the assessments do not exceed 2*s.* in the pound, in the whole, in any year, without such consent of the ratepayers as is therein specified, provided that the Pembroke Township rate shall not, in any case, exceed 2*s.* 6*d.* in the pound, in the whole, in any year.

By the 3rd section of the Pembroke Township Act, the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), is incorporated, with certain savings and exceptions, and by the 4th section of the Township Act, the Markets and Fairs Clauses Act, 1847, the Gas Works Clauses Act, 1847, and various provisions of the Waterworks Clauses Act, 1847, are also incorporated, with certain savings and exceptions. The "purposes" of the Township Act include a variety of sanitary purposes, properly so called (*i. e.* relating to health) and also a number of purposes of an entirely different nature and description, such as for instance, defraying the expenses attending the election of Commissioners (section 14); making and maintaining roads, bridges, footpaths, and other public works, within the township (section 21); defraying proportion of the Grand Jury cess for baronial charges, and charges on the county of Dublin at large (section 27); making and maintaining market houses and market places (section 30); and providing and erecting lands and buildings for fire-engine stations and appliances for the extinction of fires (section 43).

The requisite ratepayers' consent to the rate of 2*s.* 6*d.* in the pound was not obtained, and, under the 46th section of the Township Act, if the limits thereby prescribed remain in force, that rate was unauthorised, and the assessment of it was void.

It was, however, contended on behalf of the plaintiff, in support of the rate, that the limits prescribed by the 46th section of the Township Act, to the amount of the Township rate have been entirely removed by the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), and that the Township Commissioners have now an unlimited power of rating, not only for sanitary purposes properly so called, but for all the purposes of the Township Act of 1863.

This contention raises a question of great importance and wide application, and, as it relates to taxation, it ought to be very clearly established before the claim which it involves, viz., an unlimited power of taxation, is accepted as a valid one. The way in which it was argued that the Public Health Act effects this sweeping change is the following:—The Pembroke Commissioners are the urban sanitary authority of the township, and the 226th section of the Public Health Act provides that all expenses incurred, or payable by an urban sanitary authority *in the execution of that Act*, and not otherwise provided for, shall be defrayed in the case of an urban sanitary authority, such as the Pembroke Commissioners are, out of any rate leviable by them as such Commissioners throughout the whole of their district, as the Pembroke Township rate is; and the 227th section provides that any limit imposed on, or in respect of, any rate by any Act of Parliament shall not apply to any rate required to be levied for defraying any expenses incurred by the sanitary authority of any urban sanitary district *for sanitary purposes.* It was then said that "sanitary purposes" are by the second section of the Public Health Act defined to mean any objects and purposes of the *Sanitary Acts*, and that the words "Sanitary Acts" are by the same section defined to mean certain Acts therein previously mentioned (viz. Labouring Classes Lodging Houses Acts, Artisans and Labourers Dwellings Act, Bakehouse Regulation Act, Diseases Prevention Act, and Baths and Wash-houses Acts), and the Acts mentioned in the Schedule A to the Public Health Act, except the Burial Grounds Acts, and to include any amendments of such Acts, and with respect to any urban sanitary district to include "any Act, local Act, or provisional order relating to the same subject-matters as the above-mentioned Acts in force within such district." Schedule A is the schedule which shows the extent of the repeal of Acts by the 294th section of the Public Health Act. In that schedule the Towns Improvement (Ireland) Act, 1854, is mentioned and its repealed sections are therein specified as sections 33, 34, 35, 42, 45, 46, 48, 49, 52, 53 and 54, all of which, as will be found, on referring to them, relate to sanitary purposes properly so called. It was then argued that as the Towns Improvement (Ireland) Act, 1854, is mentioned in Schedule A, and as the Pembroke Township Act, 1863, relates (as it is said), to the same subject-matters as the Towns Improvement Act, the words "sanitary purposes" in the 227th section of the Public Health Act include all the purposes of the Township Act, both sanitary and otherwise, and therefore the 227th section entirely repeals all the limits in the 46th section of the Township Act, and, in effect, gives the Pembroke Commissioners, as regards the Pembroke Township rate, an unlimited power of taxation. This is not, in my opinion, the true construction nor the effect of the Public Health (Ireland) Act, 1878, which, as its name imports, and its provisions show, was passed with reference to the particular subject of public health alone. The supreme importance of the public health induced the Legislature to go very far in removing all statutory limits to rating for sanitary purposes. Other purposes distinct from sanitary purposes properly so called, were not under the consideration of the Legislature when passing the Public Health Act, and nothing was then before them to show that it was in any way necessary or expedient to give unlimited rating powers in respect of purposes wholly foreign to, and distinct from sanitary purposes. I say so because it would have been altogether outside the scope and objects of the Public Health Act in any of its bill stages to have embarked in the discussion, or consideration of matters which had nothing to do with the public health; and yet the plaintiff's contention is that a startling change in relation to taxation by giving unlimited taxing powers, for purposes not under the consideration of the Legislature at all, was effected by an Act relating expressly to the subject of public health, and to that alone. Having regard to its consequences I look upon the construction which the plaintiff's contention puts on the Public Health Act as an extravagant one, which is in no way required by the words on which the contention is based. I think there is ground for regarding the words, "the above-mentioned Acts," where they occur at the end of the definition of "Sanitary Acts" in the second section of the Public Health Act, as being used in the same sense as they are used in at the commencement of the definition, where they plainly do not include the Acts mentioned in Schedule A, and if this construction be adopted, as it excludes the Towns Improvement (Ireland) Act, 1854 (which is one of the Acts mentioned in the Schedule A, and is not one of the Acts included in the words "the above-mentioned Acts" in the commencement of the definition), from the words "the above-mentioned Acts" in the end of the definition, it prevents the Pembroke Township Act from being there referred to, as an Act relating to the same subject-matters as the Towns Improvement Act, and appears to take away the foundation of the plaintiff's contention as it was presented. I confess I would, if necessary, prefer to adopt this construction of the language of the statutory definition of the words "Sanitary Acts," rather than construe the Public Health Act, according to the plaintiff's contention; but assuming that the words "above-mentioned Acts," at the end of the definition include (as they are large enough to do), "the Acts mentioned in the Schedule A," which are referred to in the commencement of the definition, I am of opinion that the Towns Improvement (Ireland) Act, 1854, is included in the words "Acts mentioned in the Schedule A," only in so far as it is repealed, and that so far as relates to that Act the word "Acts" means only its repealed enactments, all of which as I have already observed, relate to sanitary purposes properly so called. I think this is a perfectly rational construction of the language of the statutory definition of the words "Sanitary Acts," and that it not only does no violence to that language but is in perfect harmony with it, and with the clear intent and scope of the Public Health Act. The result, therefore, in my opinion is that the Public Health Act, as its words naturally convey, and as, in my opinion, its intent manifestly was, only gives the Pembroke Township Commissioners an unlimited power of taxation for sanitary purposes, and that, therefore, they had no authority to assess the one entire 2*s.* 6*d.*, Pembroke Township rate for 1894 (which does not show how much of it is required for sanitary and how much for other purposes), without the ratepayers' consent as provided for by the 46th section of the Township Act, inasmuch as the Pembroke Township rate is assessed for a number of purposes entirely distinct from sanitary purposes, and with respect to which the limits in the 46th section have not been repealed, and it follows that the rate in question being bad the commissioners cannot enforce payment of it. The remainder of the plaintiff's claim stands undisputed, and, as the defendant has not, as he was directed by the order of the 11th inst., brought into Court that part of the claim which relates to the rates of 1893, and amounts to £10 14*s.* 11*d.*, we must give judgment against him in this action for that sum, and also for the rates of 1894, after deducting therefrom the Pembroke Township rate of 2*s.* 6*d.* in the pound, which, excluding a fraction, amounts apparently to £5 19*s.* 4*d.*, leaving £5 7*s.* 6*d.* as the amount due by the defendant on foot of the rates of 1894, so that the judgment, according to my calculation, will be for £16 2*s.* 5*d.* with such costs, if any, up to, but not including, the statement of the special case, as that judgment will entitle the plaintiff to in this action. At the argument of the special case the defendant appeared in person; but if he has incurred any costs properly taxable against the plaintiff in relation to the special case, he should be allowed them as against an equivalent amount of the plaintiff's judgment debt, and costs.

I may add that it was satisfactory to learn from Mr. Blood, that the Pembroke Township Commissioners will have no real or substantial difficulty in separating for rating their sanitary purposes properly so-called, from their other authorised purposes, though the existence of any such difficulty could not give them an unlimited power of taxation which the Legislature had not conferred upon them.

Solicitor for the plaintiff: *W. D. Bradley.*

J. P. B.

MONAGHAN, Tenant; HINDS, Landlord (1).

Appeal.
1895.

April 30.
May 17.

Land Law (Ireland) Act, 1881—*Future or present tenancy—Tenant from year to year existing at the passing of the Act—Tenant for life—Remainderman succeeding subsequent to the date of the Act—Acceptance of rent from tenant.*

In 1876 M. purchased the interest in a tenancy from year to year in 12 acres of land from R. J. H., who was tenant for life of the property. Later in the same year he acquired a tenancy from year to year in 12 acres, other portion of the same lands, at the rent of £12, from R. J. H., upon payment of a fine of £60. The gale days were January and July. R. J. H. died in May, 1886, and was succeeded by H. P. H., as tenant in fee in remainder, who took payment of the rent of the farm from M. at the same rate in July, 1886, and subsequently, giving an abatement. There was no express contract between the parties for the creation of a present tenancy.

Held (affirming the decision of the Land Commission), that M. was a future tenant.

Roulston v. *Caldwell* ([1895] 2 Ir. R. 136) distinguished.

On the 4th January, 1876, Patrick Monaghan, the father of the present tenant, bought for £70, at a public auction, the tenancy in 12 acres of the lands of Renn, in the Co. of Cavan, subject to the yearly rent of £12, from Richard John Hinds, who was tenant for life of the lands under the will of his father. On the 14th Feb., 1876, the said Patrick Monaghan purchased from the said Richard John Hinds the tenancy in another portion of the said lands, comprising 12 acres, at the sum of £60, subject to the yearly rent of £12. The gale days were January and July. Patrick Monaghan died about 1879, and was succeeded in the tenancy by Owen Monaghan. Richard John Hinds died on the 18th May, 1886, and was succeeded by his nephew, Henry P. Hinds, in the remainder in fee under the will of his grandfather. After the death of Richard J. Hinds, Henry P. Hinds sent to Owen Monaghan for the rent due in July, 1886, which he paid to the landlord, receiving an abatement of £4; and from that time on he had remained in possession of the farm, paying the same rent; but there was no

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(1) Before Walker, C., Sir Peter O'Brien, L.C.J., and Fitz Gibbon and Barry, L.JJ.

Appeal.
1895.
MONAGHAN, *Tenant;* HINDS, *Landlord.*

express contract for the creation of a present tenancy. On the 23rd January, 1893, Owen Monaghan served notice to fix a fair rent, and the Sub-Commissioners dismissed the originating notice on the ground that it was a future tenancy. On appeal to the Land Commission this decision was affirmed by order dated the 7th December, 1894. From that order the tenant appealed.

T. M. Healy, for the appellant:—

The tenancy in this case was a present tenancy in consequence of the action of the landlord in adopting it as such. *Massy* v. *Norse* (1) is distinguishable upon two grounds—1, the acceptance of rent by the remainderman sets up the old tenancy; 2, this tenancy was not created by the tenant for life at all, but existed long before. Under sect. 57 every tenancy shall be deemed to be a present tenancy till the contrary is proved. Here the remainderman not only received the old rent, but applied to the tenant for payment. There has been such an adoption of this tenancy as to make it relate back: *Roulston* v. *Caldwell* (2); *Doe* v. *Jenkins* (3). It takes some definite act to destroy a tenancy: *Conroy* v. *Drogheda* (4).

[Counsel also referred to *Curoe* v. *Gordon* (5); *M'Donnell* v. *Blake* (6); *Seymour* v. *Quirke* (7); *Looby* v. *Finch* (8).]

Dane and *T. H. Maxwell*, for the landlord:—

The tenancy ceased with the death of the tenant for life: *Wakefield* v. *Hendron* (9); *Massy* v. *Norse* (1). The tenancy was gone before the remainderman came in. *Roulston* v. *Caldwell* (2) was a case of mortgagor and mortgagee, in which the tenancy was still in existence, and the mortgagees were held to have adopted the tenancy by their acts. The mere acceptance of rent cannot revive a tenancy no longer in existence: *Jenkins* v. *Church* (10); *James* v. *Jenkins* (11); *Robson* v. *Flight* (12); *Doe* v. *Butcher* (13).

(1) 20 L. R. Ir. 464.
(2) [1895] 2 Ir. R. 136.
(3) 5 Bing. 469.
(4) [1894] 2 Ir. R. 590.
(5) 26 Ir. L. T. R. 95.
(6) 28 L. R. Ir. 395.
(7) 14 L. R. Ir. 97.
(8) 30 L. R. Ir. 568.
(9) 11 L. R. Ir. 505.
(10) Cowp. 482.
(11) Buller's N. P. 96 B.
(12) 4 De G. J. & Sm. 608.
(13) 1 Doug. 50.

WALKER, C.:—

Appeal. 1895.

MONAGHAN, *Tenant;* HINDS, *Landlord.*

May 17.

The question raised in this appeal was whether the tenancy was a future tenancy. The owner in fee devised the lands to Richard J. Hinds for life, with remainder to the present respondent, and the testator died on the 7th December, 1861. In January, 1876, Richard J. Hinds let the lands to the tenant, and took a fine "as a fine for a farm of land." The gale days are January and July. Richard J. Hinds died on the 18th May, 1886, and the remainderman received the rent after the death of the tenant for life, and thence to the present.

When the case was first opened it appeared to us that a question might arise (the land being situate in Ulster) whether there had not been in 1876 some transfer of an existing tenancy rather than the creation of a new one, and we allowed evidence by affidavit to be given on this point. It is now stated that the lands had been in the hands of a tenant, and were evicted in 1846, and got into the possession of Richard J. Hinds, and it was argued that this tenancy was in some way in him from thence to 1876, and was then transferred. There is nothing to show that the lands were not part of the estate in 1876, or that there was any outstanding interest in Richard J. Hinds, a thing which is hardly conceivable. I have no doubt that the case must be treated as one in which the tenancy was created by Richard J. Hinds, the tenant for life. That being so, it was argued that, though the tenancy dropped on the 18th May, 1876, yet inasmuch as the remainderman received the rent which accrued partly in the tenant for life's time and his own, and thence to the present, he elected to treat the tenancy as a continuing one, and that the case was governed by *Roulston* v. *Caldwell* (1), decided by this Court, and that the remainderman elected to adopt the tenancy as a present tenancy, and as having had existence in 1881. In aid of that Mr. Healy relied on the presumption that every tenancy is a present tenancy till the contrary is shown. The case must be considered, 1, independently of the decision in *Roulston* v. *Caldwell* (1), and, 2, with the aid of that authority. It is a well-settled doctrine of our real property system that a tenant for life cannot create any estate greater than his own—whether by grant, or letting, or incumbrance—and that any letting made by him terminates with the estate out of which it issues, unless it be created under a power annexed to the estate, or under a power derived from some statutory provision. There is no suggestion of the first here, and whether there is one created by statute depends on the true construction of the Act of 1881. *Sparrow* v. *Hepenstall* (1) is of no higher authority than the decision appealed from, and therefore I do not further refer to it; but *Wakefield* v. *Hendron* (2), and *Peyton* v. *Gilmartin* (3), are authorities conclusive on the point against the appellant, unless there is something in the decision in *Roulston* v. *Caldwell* (4) which justifies us in holding that a tenancy as of 1876 was set up. It will be observed that *Peyton* v. *Gilmartin* (3) was a case of a fair rent fixed against a tenant for life, which raised a different question—much stronger for the tenant—and in *Peyton* v. *Gilmartin* (3), in which I was counsel, I endeavoured to argue the case on the assumption that, as limited owners had power by the Act of 1881 to create certain tenancies, so they had power to fix a fair rent for fifteen years, and this was the basis of O'Brien, J.'s, view. Apart from anything to be found in *Roulston* v. *Caldwell* (4), as applied to the facts, I think it is obvious both on principle and authority that Richard J. Hind's letting came to an end on the 18th May, 1886. What then was the effect of receipt of rent? It is well settled that it created the relation of landlord and tenant between the remainderman and the tenant, on the terms of the pre-existing letting, and a notice to quit was necessary. The date to be attributed to the inferred letting never was material under the old law. It is clear that the day after the death of the tenant for life, and when the rent was first received in 1886, there was no letting in existence between the tenant and any one; the inheritance had no tenancy attached to it. In a case like *Roulston* v. *Caldwell* (4), there was a tenancy at all events between the mortgagor and the tenant subsisting and in full force, when the mortgagee intervened, and we held that the mortgagee by express contract had adopted that tenancy with all its incidents, one of which was a present tenancy against the

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(1) [1895] 2 Ir. R. 136.

(1) 24 Ir. L. T. R. 66.
(2) 11 L. R. Ir. 510.
(3) 28 L. R. Ir. 378.
(4) [1895] 2 Ir. R. 136.

mortgagee, and could not dispute that the tenant was a present tenant of his. It is not suggested that there was here any express contract, and it is not necessary to give any opinion upon what would follow from such a contract. It can only be worked out by the receipt by the remainderman of the rent, which accrued between January and May as part of the rent paid for July, 1886, but tenancy for life and tenancy out of it had ceased to exist in May; therefore, apart from estoppel, there must have been a new creation of a tenancy in 1886. We have not, therefore, the same state of facts as in *Roulston* v. *Caldwell* (1), nor the same special contract. I think the case is the common one, well known to all real property lawyers, of a tenancy created by a tenant for life ending with his estate, and that, as the law stands, the decision appealed from was right. Whether in such a case as the present—a very common one in this country—it should not be possible, and reasonable, and just, to fix a fair rent against the inheritance, is a matter for the consideration of the Legislature.

SIR PETER O'BRIEN, L.C.J.:—

I quite agree with the Lord Chancellor, and retain the opinion I formed when the case was fully opened. Mr. Healy argued that there was an over-hanging tenancy binding the inheritance, binding both the estate for life and the remainderman. That is difficult of appreciation in point of law, and wholly without foundation in point of fact. The next point was that there was a tenancy from year to year created by the tenant for life, which was prolonged in some way when the remainderman came into possession, that the receiving of a portion of the rent was applicable to the periods during which the tenancy for life existed, and that the remainderman should be taken by that fact to have affirmed the prolongation of the tenancy, created by the tenant for life. It is a very elementary law that a tenant for life cannot affect a remainderman by a lease or contract of tenancy except by an express power, or under a statutory provision; and I cannot infer from the mere receipt of a portion of rent which was accruing during the tenancy for life a contract to carry on, and subject

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(1) [1895] 2 Ir. R. 136.

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Sir P. O'Brien, L.C.J.

the estate in remainder to, the self-same contract of tenancy which existed during the life estate. There is no authority to sustain such a contention. The only case that caused any difficulty was *Roulston* v. *Caldwell* (1); a decision of this Court, to which I was not a party, but which, of course, in an identical state of facts it would be my duty to follow.

That was a case in which, *ex concessis*, there was a tenancy existing between the mortgagor and the tenant, and the ground of the decision was that it was adopted by the mortgagee by express contract. Nothing could be plainer than the language of the Lord Chancellor in that case. The Lord Chancellor said (after reading the correspondence) (p. 140)—"I read these letters as equivalent to an arrangement between the now respondents and Roulston, that he should for all purposes become their tenant, with all the rights and liabilities which the contract of tenancy created, and all the incidents attached to the subsisting tenancy, and for ten years the parties have acted on that basis." Again, later on, the Lord Chancellor says (p. 141)—"I also consider that the case of *Gladman* v. *Plumer* (2) is an authority that direct express contract may carry back the relation of landlord and tenant to any agreed time. I infer from the documents here and the acts of the parties an express contract that Roulston shall be tenant to the mortgagees for all the purposes and on all the terms of the lease, with all its incidents. Roulston had a present tenancy, subsisting at the passing of the Act of 1881, and he was in possession and occupation under it. There was, therefore, an existing *status*. I think it was competent to adopt it, and it was adopted for the highest considerations." That is what the Lord Chancellor says—he puts his decision on the ground of express contract, of an express contract to take the tenancy over. Fitz Gibbon, L. J., said (p. 141)—"There is express reference again and again, to the tenancy as one within the Acts, and there is express reference to the tenure under the lease; lastly, the deduction of the rates was settled in favour of the mortgagees, on their own requisition, upon the basis of the continuance of the lease, and they insisted upon a payment to which they would not have been entitled, if they were not landlords, bound by the lease. Therefore there was even a contract, and consideration paid, for the continuance of the old tenancy." And Barry, L. J., said (p. 144)—"The proposition of fact to be determined is, what is the contract between the mortgagee, who has gone into possession, and the tenant previously in possession, under a letting made by the mortgagor? That question does not depend here on the mere acceptance of rent. I am of opinion that it is satisfactorily made out by the correspondence and the acts of the parties, that, as a matter of fact, the mortgagees and the tenant contracted that the tenancy taken over was to be for all intents and purposes a tenancy within the Land Act." Here the Lord Justice clearly intimates an opinion in which I entirely concur, that the mere acceptance of rent would not have been sufficient to devolve as it were upon the mortgagee the same identical contract which existed between the mortgagor and the tenant. *Roulston* v. *Caldwell* (1) is plainly different from the present case. There is not a shadow of ground for saying that there is an express contract here, and there is in this case none of the determining factors which existed in *Roulston* v. *Caldwell* (1). Here when the tenant for life died, the tenancy was at an end; in *Roulston* v. *Caldwell* (1) there was an existing tenancy all through between the mortgagor and the tenant, and the mortgagees took it over by express contract. Here the yearly tenancy ceased to exist with the cesser of the life estate, and mere receipt of a portion of the rent which accrued during the life estate cannot recall to life what was dead, and attach it as a thing that had continuous existence to the estate which took effect on the dropping of the life estate.

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(1) [1895] 2 Ir. R. 136.

(2) 15 L. J. Q. B. (N. S.) 79.

FITZ GIBBON, L. J.:—

It is a question of fact, and not of law:—What were the dealings between the parties upon the death of Richard John Hinds in 1886? On the matter of fact, it is quite clear that there was then a new letting by Henry P. Hinds. The land had been in the actual possession of a tenant for life, who had let it to a tenant, and if the subsequent legislation did not affect the rights of the parties, the tenancy thus created by the tenant for life came to an absolute end, by and at his death. This case is, therefore, distinguishable from *Roulston* v. *Caldwell* (1), though I do not regard the tenancy, in either case, as being "prolonged." *Roulston* v. *Caldwell* (1) was a case of mortgagor and mortgagee, between which and the case of tenant for life and remainderman there are two plain distinctions. Where a mortgagor in possession lets land, without the concurrence of the mortgagee, he creates a tenancy which remains good between the parties, in all respects, unless and until the mortgagee intervenes, though it does not bind the mortgagee. When the mortgagee recognises the tenant, it is rather a case of novation, or of change of parties to the contract, than of the creation of a new tenancy. The land is not for a moment untenanted; the tenancy is taken over, rather than prolonged or created *de novo*, and it is therefore easier to hold that it continues. But there is another distinction between the two cases, tending in the same direction. There is a relation, for certain purposes, between mortgagor and mortgagee, in the nature of principal and agent or bailiff, which does not exist between a tenant for life and remainderman. This brings in the question of the *adoption* of a contract, when made by one who is in the position of bailiff or agent, which does not arise here.

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(1) [1895] 2 Ir. R. 136.

These broad general and distinct grounds were both stated by us in *Roulston* v. *Caldwell* (1), and there was also a third ground peculiar to the particular case, which was strongly relied upon, and which is not to be found here, namely, the express contract between the mortgagees and the tenant that the tenancy when recognised should have the incidents of a "present tenancy." Here there is nothing express. What is to be implied? The only foundation for any implication is the receipt by the remainderman of the gale of rent which was running when the tenant for life died. Under Deasy's Act, such a payment would be made as of right, in the case of a continuing tenancy, to save the tenant from having to deal with two landlords at the same time. Such a circumstance is not immaterial, but it is not enough to show that there was anything more than the ordinary dealing, by which a tenant in remainder usually, for convenience, takes the gale of rent accruing at his predecessor's death, and accounts for part of it with the executor of the tenant for life. I cannot treat that fact, without anything else, as an abandonment of his legal rights by the remainderman, or as proof of an express contract between the parties that the old tenancy is to continue unbroken, contrary to the ordinary law. There is in this case no conduct, no change of position, no act of either party, tending to an estoppel, such as existed in *Keating* v. *Bolton* (1). Therefore, the mere taking of rent in analogy to Deasy's Act, is in my opinion insufficient to change the contract, or to alter the *status* or rights, arising by implication of law between the occupier and the remainderman upon the expiration of a tenancy created by a tenant for life. It is for the Legislature to bind the remainderman in such a case, if it thinks fit. None of the Land Acts from beginning to end contains any provision binding the estates of owners by title paramount, who are not before the Court. It is not for us to affect the property of third parties, without express legislation to justify such a course.

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(1) [1895] 2 Ir. R. 136.

There is one observation which I think it right to make, namely, that this decision of ours rests upon the finding that there was no express contract in this case between the parties. I give no opinion on the question whether an express contract by a remainderman to take over, as a "present tenancy," a tenancy created by a tenant for life will not bind him. There is a great deal to be said upon *Roulston* v. *Caldwell* (2) on that point, and I reserve it until it arises.

Barry, L. J.:—

I agree and for the reasons given by my colleagues. I have taken the opportunity upon several occasions, of calling attention to the fact that beginning with the Act of 1881, no notice was taken from first to last by the Legislature of the well-known state of things existing in this country that the land was largely in the hands of mortgagees who managed the land through the mortgagors, who were in possession, and by tenants for life who could only create tenancies for their own life. It appears strange that it

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(1) 22 L. R. Ir. 143.

(2) [1895] 2 Ir. R. 136.

Appeal. 1895.

MONAGHAN, *Tenant;* HINDS, *Landlord.*

Barry, L.J.

occurred to no one to suggest it, or that it did not enter the minds of those who came to frame that Act. However, we have to deal with the Act as we find it. There are two classes of cases, one of mortgagor and mortgagee such as *Roulston* v. *Caldwell* (1), and in that case we decided that if a mortgagee came into possession to exercise his rights he may adopt the tenancy by express contract, he may take over the tenancy created by the mortgagor, and might by express contract make it a present contract of tenancy with himself. That is a simpler case than that of tenant for life and remainderman, because with the death of the tenant for life all tenancies come to an end. Under these circumstances I am of opinion that the decision of the Land Commission should be affirmed. I have thrown out already that the cases of mortgagor and mortgagee, and tenant for life and remainderman, ought to be provided for by the Legislature, if they think fit to do so; it is for them to make matters right.

Solicitor for the landlord: *Richard Allen.*
Solicitor for the tenant: *Gilsenan.*

R. D. M.

Appeal. 1895.

June 7, 11.

FITZ SIMONS, TENANT; ELLIS, LANDLORD (2).

Land Law (Ireland) Act, 1881—*Future tenancy—Tenancy existing at the passing of the Land Law Act,* 1881—*Surrender to the landlord—Re-letting of portion of the holding before* 1*st January,* 1883.

J. H. held from T. E. 14A. 2R. 25P. (Ir.) of the lands of D., in the county of Cavan, under lease dated the 24th January, 1865, for the term of twenty-one years, at the rent of £27 15*s*. 6*d*.; the term was subsequently changed by endorsement on the lease into a lease for the life of the lessee. J. H. died in 1876, and was succeeded in the possession of the farm by his widow, E. H., who continued in possession until April, 1882, when she surrendered to the landlord the whole of the farm. The landlord then sub-divided the farm, giving Mrs. H.

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(1) [1895] 2 L. R. Ir. 136.
(2) Before WALKER, C., and FITZ GIBBON and BARRY, L.JJ.

the house and 10 acres, statute measure, at a rent of 10*s.* a year for her life, and the remainder was let to G. in three distinct parts:—(*a*) 4½ statute acres, at the rent of £22 10s.; (*b*) 4a. 1r. 19p., at a rent of £12; and (*c*) 4a. 1r. 29p., at a rent of £10 10*s.* These lettings were made in 1882, and took effect from the 1st November, 1882. In January, 1890, G. sold the holdings *b* and *c* to F., who served a notice to fix a fair rent of the holding *c*:—

Held (affirming the decision of the Land Commission), that the tenancy in the holding was a present tenancy.

Case stated by the Land Commission.

James Hopewell held from the Rev. Thomas Ellis 14a. 2r. 25p., Irish measure, of the lands of Drumalee in the county of Cavan, at the yearly rent of £27 15*s.* 6*d.*, under a lease dated the 24th January, 1865, for a term of twenty-five years, from the 1st November, 1864. The term was subsequently changed by endorsement on the lease into a lease for the life of the lessee. James Hopewell died in April, 1876, and was succeeded in the possession of the farm by his widow Eliza Hopewell, who paid the yearly rent of £27 15*s.* 6*d.* therefor and continued in occupation until the month of April, 1882.

Mrs. Hopewell, on the 11th April, 1882, surrendered to the landlord the whole of the farm formerly held under the lease; the surrender was by deed endorsed on the lease. The landlord then sub-divided the farm, giving Mrs. Hopewell the house and 10 acres, statute, at a rent of 10*s.* a year for her life, and the remainder of the farm was let to Mr. Joseph D. Grier. The portion of the farm taken by Mr. Grier was let to him in three distinct parts:—(*a*) One consisting of 4½a., statute measure, at the rent of £22 10*s.* per annum. (*b*) A second containing 4a. 1r. 19p. statute measure, let at a rent of £12 per annum. (*c*) A third containing 4a. 1r. 29p., statute measure, let at a rent of £10 10*s.* per annum. These lettings were made in 1882, and took effect from the 1st November, 1882. In January, 1890, Grier sold the holdings (*b*) and (*c*) to the present tenant, Michael Fitzsimons. The originating notice comprised both holdings, but at the hearing before the Land Commission the holding let at £12 was struck out, and the case proceeded with respect to the other holding. The Land Commission held that the tenancy was a present tenancy within the definition of sect. 57 of the Act of 1881, but, on the application of counsel for the landlord, agreed to state a case for the Court of Appeal. The question was—Whether the tenancy in the holding now subsisting is a present or future tenancy?

Ross, Q.C., and *T. J. Smyth*, for the landlord.

Law Smith, for the tenant.

June 11.

WALKER, C.:—

In this case the premises were held under a lease of the 24th January, 1865, for a term of twenty-one years at the rent of £27 15*s.* 6*d.*, the area being 14A. 2R. 25P., Irish measure. It appears by the case that the tenant, James Hopewell, died in the month of April, 1876, and his widow held on after his death, and she continued in occupation until April, 1882, when she surrendered to the landlord. It was then competent to the landlord to demise the whole subject to at all events one person who under the definition would be a present tenant. There was however a sub-division made, and the house and 10 statute acres were given to the widow at a rent of 10*s.* a year for her life, and the rest was let to one Grier in three parts:—the first one consisting of 4½A., statute measure, at the rent of £22 10*s.* a year; a second containing 4A. 1R. 19P., statute measure, at a rent of £12 a year; and the third containing 4A. 1R. 29P., statute measure, at a rent of £10 10*s.* a year; all of them to operate from the 1st November, 1882. It appears that Fitzsimons, the tenant, bought the last two of those lots, that is the 4A. 1R. 19P., and 4A. 1R. 29P.; both were consolidated in the originating notice but at the hearing the first was struck out. The Land Commission held that there was a present tenancy but they agreed to state a case for our opinion. It was argued that on the definition of "holding" and of "present tenancy" which means "a tenancy subsisting at the time of the passing of this Act or created before the 1st January, 1883, in a holding in which a tenancy was subsisting at the time of the passing of the Act," this piece of land could not fit in with the definition, as it was said the thing on which the tenancy was created must be the whole holding, no more and no less. I say nothing as to the question where additional lands are let for value with the subject of the present tenancy. That would raise a different question, like what we had to consider in *Conroy* v. *Drogheda* (1). It is quite a different question whether the exclusion of a part of the old holding prevents the definition from applying. In my opinion such exclusion does not. It would involve the absurdity that if there was a letting of 100 acres, subsisting at the date of the passing of the Act of 1881, and that was surrendered to the landlord, he could not re-let 99½ so as to become the subject matter of a present tenancy. It would also lead to many cases of fraud. It seems to me that if the subject is once a present tenancy, the creation during the statutory interval of a tenancy in that subject, or any part of it, which already had been impressed with the character of a present tenancy, comes within the definition. "Holding" means "a parcel of land," this is a parcel of land. In November, 1882, there was a parcel of land contained in the letting which Fitzsimons acquired, and the two subjects let to Grier were parcels of land.

There was a case referred to, *Truell* v. *Doyle* (2), the facts of which appear to me identical with the present. In *Truell* v. *Doyle* (2) a fair rent was fixed on 53 acres. In that case Byrne and Doyle were tenants, and the letting comprised 50 statute acres of pasture lands, known as the Wicklow Murrogh, 15 acres of grass known as the Marsh, 7 acres of reedy bog and 14 acres of tillage, making altogether 86 acres. In 1882 there was a surrender by both tenants to the landlord. Peter Byrne was compensated, and Doyle became tenant of 53 acres out of the 86, and there the point was raised that Doyle was not a present tenant. It was decided on a case stated that he was. That is identical with the present case. The case of *Irwin* v. *Goodlätte* (3), which we had before us on the 16th May of this year, seems to me also the same in principle, for we held there that it is competent for the landlord to take up from the tenant a portion of the land, reducing the area and rent, and yet leave the definition "holding" satisfied by what remained the subject of the tenancy, so as not to affect the *status* of a present tenant.

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(1) [1894] 2 Ir. R. 590. (2) Not reported, 1889. (3) Not reported.

Appeal.
1895.
FITZSIMONS, *Tenant;* ELLIS, *Landlord.*

Under these circumstances I am of opinion that the question submitted to us by the Land Commission should be answered in the affirmative.

FITZ GIBBON, L.J.:—

I think this case is ruled by *Truell* v. *Doyle* (1), which seems to have been overlooked, although it came before us on a case stated by the Land Commission, to which I now refer. In that case four plots of land had been held by Patrick Doyle and Peter Byrne, as tenants from year to year—(1) 50 acres of pasture land known as the Wicklow Murrogh; (2) 15 acres of grass known as the Marsh; (3) 7 acres known as the Reedy Bog; and (4) about 14 acres of tillage known as the Murrogh Lots. The case states that "the parcels of land specified, though held in severalty by the two tenants amongst themselves, constituted up to the time of the surrender one holding as between landlord and tenants." In 1882 Peter Byrne surrendered all he had, and Patrick Doyle, before January 1, 1883, took all the land in the 4 lots except half of the tillage, the whole of the Marsh, and 10 acres of the Wicklow Murrogh. There was a new letting to him of part, but not of the whole of the land which he had previously held jointly, and he became occupier for the first time of part of what Byrne had held. The Land Commission decided, and we upheld the decision, that this dealing created a tenancy, after the passing of the Land Law (Ireland) Act, 1881, in a holding in which a tenancy was subsisting at the passing of the Act, notwithstanding that the holding in which the tenancy subsisted at the time of the passing of the Act comprised more land than the holding which was covered by the existing tenancy. That is the same case as this; and if *Truell* v. *Doyle* (1) had been referred to, this case need not have been stated. I think the decision is right. A certain portion of the surface of Ireland was, at the passing of the Act, covered by present tenancies, and the intention of the Act was to prevent that portion from being withdrawn from the operation of the new law as to present tenancies by means of lettings which might be made between the passing of the Act of 1881 and January, 1883. The

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(1) Unreported.

Fitz Gibbon, L. J.

question turns on the meaning of the words "*in which*." If we read "a holding *in which* a tenancy was subsisting" as meaning "a holding *in the whole of which* one single tenancy was subsisting," we should exclude from the benefit of the Act a number of cases to which it was meant to apply.

I say nothing about cases where new land was brought into tenancy for the first time after the Act. Possibly, even in such a case, the question might arise whether the holding had been substantially covered by the tenancy existing at the passing of the Act. But in this case, as in Truell's case, the whole of the land in question was, at the passing of the Act of 1881, covered by a present tenancy. These definitions are, no doubt, constructed like a Chinese puzzle; but it occurs to me that, so long as the parcel of land includes nothing more than what was covered by a present tenancy at the passing of the Act, the tenancy is a present one within the real meaning of the section. It is right to say that we limit our decision strictly to the tenancy before us, and we say nothing as to the other portion of the old holding which was let to the widow of the previous tenant. Her position may be similar to Wilson's case, where a widow was left in occupation, as a personal convenience, for her life, and it was held to be a temporary letting. We must not be supposed to decide anything beyond the particular case now brought before us.

Barry, L.J.:—

I concur, confining myself altogether to the particular holding which is the subject matter of the case. In my opinion, on the true construction of the Act of Parliament, there is a present tenancy vested in the tenant of this holding.

Solicitor for the landlord: *Richard Allen.*
Solicitor for the tenant: *H. P. Kennedy.*

R. D. M.

Ex. Div.
1894.
Oct. 30.

CLEARY, APPELLANT; VISCOUNT DE VESCI, RESPONDENT (1).

*Trespass in pursuit of game—27 Geo. 3, c. 35—27 & 28 Vict. c. 67—**Rabbits**—Tenant not holding under a judicial tenancy—Conveyance by tenant to landlord of game, including **rabbits**.*

Lands were occupied by a tenant of the complainant, not under a judicial tenancy; and the tenant had by deed granted to the complainant the exclusive right to the game on such lands, including rabbits. C., a person not authorised by the tenant or complainant, was found on such lands with nets and ferrets pursuing rabbits. The complainant prosecuted C. for, without being duly authorised, entering and being on said lands in pursuit of game:—

Held, that such prosecution could not be sustained under either of the statutes 27 Geo. 3, c. 35, or 27 & 28 Vict. c. 67.

Hope and others v. *Callaghan* (24 Ir. L. T. R. 5) distinguished.

CASE STATED by Justices pursuant to 20 & 21 Vict. c. 43.

At a Petty Sessions held at Abbeyleix, Queen's Co., on 15th September, 1894, George Mills and James Cleary were charged by summons for "that you and each of you on Friday, 10th August, 1894, unlawfully and wilfully committed a trespass on part of the lands of Colebally, in the Queen's County, then being in the occupation of Mrs. Anne Claxton as tenant to the complainant, and of which the complainant is landlord, and the exclusive right to the game on which is reserved to the complainant, by then and there unlawfully and wilfully, and, without being duly authorised by complainant, entering and being on said lands, provided with nets and ferrets in search and pursuit of game thereon contrary to the form of the statutes in such case made and provided." On the hearing of such charge the complainant and the defendant Cleary were respectively represented by their solicitors: the defendant Mills did not appear. The justices having heard the charge, convicted both defendants, and fined Mills £2, in default one month's imprisonment; and Cleary 10*s*., in default seven days' imprisonment: and on the application of Cleary (1) stated a case as follows:—At the hearing of the said complaint it was proved on the part of the complainant that the defendants were found on the 10th August last on part of the lands of Coleballý in the Queen's County, said lands being then in the occupation of Mrs. Anne Claxton as tenant to the complainant, that the defendants were then and there provided with nets and ferrets and were looking for rabbits, the nets being set on the rabbit burrow. A deed dated the 21st November, 1878, by which the game on said lands was conveyed to the complainant (the word "game" in said deed being thereby defined to include "rabbits") was put in evidence; and the execution thereof by Mrs. Anne Claxton was duly proved by Peter Boyton; and it was admitted that a judicial tenancy in said holding did not exist.

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(1) Before PALLES, C.B., and ANDREWS, J.

The following is a copy of an extract from said deed furnished with said case:—

" This Indenture witnesseth that we whose names are hereunto subscribed in consideration of the sum of one penny to each of us paid on the execution hereof by the Right Hon. J. R. W. Viscount De Vesci, of Abbeyleix, in the Queen's County, do hereby severally and respectively for ourselves, our executors, administrators, and assigns, convey, transfer and make over to the said Right Hon. J. R. W. Viscount de Vesci, his heirs, executors, administrators, and assigns, All and every our right, title, claim and demand respectively of every nature and kind soever in whatever manner existing in and to the game which may be found on the several farms, lands, and tenements situated at the several places hereunder written and which now are held by us as lessees or occupiers thereof, together with full liberty for himself, and all others by his appointment, at all times to enter upon the said farms, lands, and tenements respectively for the purpose of hunting, fowling, and fishing, and the game, fowl, and fish there found to kill, take, and carry away. The aforesaid word "game" shall be deemed to include hares, rabbits, pheasants, partridge, grouse, heather or moor game, black game, woodcocks, snipes, quails, landrails, wild duck, widgeon, and teal.

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(1) The case was stated on the application of Cleary alone. Mills appealed to the Quarter Sessions, and on the hearing of the appeal at the Michaelmas Quarter Sessions, 1894, the chairman (Judge Fitzgerald) reserved his decision till the next Sessions, pending the decision on the case stated. At the Hilary Quarter Sessions, 1895, the chairman delivered judgment, reversing the conviction against Mills, with costs.—Rep.

Witness our hands this 21st day of November, 1878.

EXTRACT OF SIGNATURES TO DEED.

Tenants' Names.	Farms, Lands, and Tenements.	Seal.	Witness.
Anne Claxton,	Colebally, .	—	Peter Boyton.

And whereas it was contended on behalf of the defendant Cleary that as no judicial tenancy existed in said holding, and that as defendants were proved to be in pursuit of rabbits, the complainant could not prosecute as legal occupier under 27 & 28 Vict. c. 67, and that the summons being brought on the grounds that the defendants were not authorised by complainant to enter on the lands he could not sustain a prosecution under 27 Geo. III., c. 35; and whereas it was contended on behalf of the complainant that complainant was entitled to prosecute under 27 & 28 Vict. c. 67, and 27 Geo. III., c. 35, by reason of the conveyance to him of the exclusive right to the game, including rabbits, on the lands before referred to, under the authority of the decision of the case of *Hope and Others* v. *Callaghan* (1), and the above-recited statutes. And whereas upon the said hearing we being of opinion that it was proved that the defendants were found trespassing on the said lands in pursuit of rabbits, and that the landlord having the rabbits on said lands reserved to him by said deed was entitled to sustain a prosecution under 27 & 28 Vict. c. 67, and the 27 Geo. III., c. 35, we gave judgment against the defendants as aforesaid, and hereupon the judgment of the Court is required as to whether we the said Justices were correct in point of law in our determination as aforesaid, that rabbits were game upon the facts stated in this case, for trespass in pursuit of which the prosecution lay under 27 & 28 Vict. c. 67, and 27 Geo. III., c. 35, or as to what should be done in the premises.

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(1) 24 Ir. L. T. R. 5.

Ex. Div.
1894.

Cleary,
Appellant;
De Vesci,
Respondent.

Brett, for the appellant (Cleary):—

Rabbits are not "game" within the meaning of the statutes 27 Geo. III., c. 35, or 27 & 28 Vict. c. 67; consequently no prosecution for trespass in pursuit of rabbits (as game) can be sustained under either of those statutes. But Viscount De Vesci relies on the terms of the deed of 21st November, 1878, as enabling him to prosecute under the provisions of 27 & 28 Vict. c. 67. Sect. 1 of that Act provides: "When the landlord or lessor of any lands has *reserved* to himself the exclusive right to the game on such land, then such landlord . . . shall be deemed the legal occupier of the land" (as if he were the actual occupier as contemplated by 27 Geo. III., c. 35), and be entitled to prosecute for trespass in pursuit of game; and sect. 2 thereof defines "game," but the definition does not include rabbits. The conveyance of the game (including rabbits) would not be a "reservation" within the meaning of sect. 1: *Castletown* v. *Powell* (1); nor could a deed *inter partes* have the effect of extending the provisions of a penal Act of Parliament, so as to vest in a person rights of criminal prosecution, which rights were not conferred by Act of Parliament. The summary jurisdiction in matters of game preservation is entirely the creation of statute; and it would be altogether novel to argue or decide that a mere deed *inter partes* could confer jurisdiction which statutes have not given. The conviction is clearly bad, and should be quashed.

Wakely, for the respondent (Viscount De Vesci):—

No doubt rabbits are not "game" within the meaning of 27 Geo. III., c. 35, or 27 & 28 Vict. c. 67; but this case does not depend solely on those Acts, it depends also on the Ground Game Act, 1880 (43 & 44 Vict., c. 47), and the Land Law (Ireland) Act, 1881. If this were the case of a judicial tenancy with game rights reserved to the landlord under sect. 5 of the latter Act, it is clear that the landlord could prosecute for trespass in pursuit of rabbits: *Hope and Others* v. *Callaghan* (2). But that decision is not really confined to the case of a judicial tenancy: it really covers the present case. In delivering the unanimous judgment

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(1) 30 L. R. Ir. 93.

(2) 24 Ir. L. T. R. 5.

Ex. Div.
1894.

CLEARY, *Appellant;* DE VESCI, *Respondent.*

of the Divisional Court of the Queen's Bench Division, Mr. Justice Harrison said: "The effect of the Statutes" (referring to the Ground Game Act, and the Land Law, Ir. Act), "is that rabbits are game, and that the landlord in the case of a present tenancy under a judicial order fixing a fair rent reserving the game to him—just like a landlord of a tenancy created by deed with a similar reservation—is qualified under 27 & 28 Vict. c. 67, to prosecute under s. 10 of 27 Geo. III., c. 35, as though he were in actual occupation of the lands, and entitled so to maintain trespass." Applying such decision to the present case, it seems clear that under the present circumstances the complainant was entitled to prosecute and the Justices to convict. Besides sect. 7 of the Ground Game Act appears to vest in Viscount De Vesci the right of prosecuting in a case like the present: the words of that section indicate that it was the intention of the Legislature to provide for a contingency like the present. If it be held that the conviction is bad, it will practically leave persons to whom game has been reserved without a remedy against poaching.

THE LORD CHIEF BARON delivered the unanimous judgment of the Court, holding that rabbits were not "game" within the meaning of 27 Geo. III., c. 35, or 27 & 28 Vict. c. 67; and that the provisions of those Acts could not, for the purposes of prosecution and conviction, be extended by a deed. He was also of opinion that the provisions of those Acts were not so far extended by the 7th sect. of the Ground Game Act as to confer on the owner of the rabbits the right of prosecuting in cases where such right was not already provided by statute. The conviction was bad and should be quashed.

The following is the curial part of the order:—

> "THE COURT being of opinion that the said Justices were not correct in point of law in their determination, as mentioned in the said case, doth hereby quash the conviction pronounced by them with costs, including the costs of the said case and of this argument, to be paid by the said respondent to the said appellant when taxed and ascertained."

Solicitor for the appellant: *J. Waldron, jun.*

Solicitor for the respondent: *C. O'C. Fitzsimon.*

J. P. B.

THE QUEEN *v.* HEHIR (1).

Cr. Cas. Res.
1895.
June 17, 24,

Criminal law—Larceny—Delivery of chattel under mistake as to its character—Mistake common to both parties—Subsequent fraudulent appropriation.

The prosecutor owed the prisoner the sum of £2 8*s*. 9*d*. for work done in his employment. The prosecutor, intending to discharge the debt, handed to the prisoner 9*s*. in silver and two notes, both of which were believed, alike by prosecutor and prisoner, to be £1 notes. One of these was a £10 note. There was evidence that, after receiving this note, the prisoner discovered its true value, and fraudulently appropriated it to his own use. On this evidence the jury convicted the prisoner of larceny:—

Held by Sir Peter O'Brien, L.C.J., Palles, C.B., O'Brien, Andrews, and Johnson, JJ. (*diss.* Murphy, Holmes, Gibson, and Madden, JJ.), that the subsequent fraudulent misappropriation of the £10, previously innocently acquired, did not amount to larceny, and that the conviction should be quashed.

Reg. v. *Ashwell* (16 Q. B. D. 190) considered.

Case reserved by the Lord Chief Baron as follows:—

"At the Assizes for the Munster Winter Assize County, 1894, held at Cork under the provisions of the Munster Winter Assize County Order, 1894, Denis Hehir was tried before me and a common jury for the larceny of 'Nine pounds sterling, of the goods and chattels of one John Leech'; but during the course of the trial, upon the application of Mr. Bourke, Q.C., counsel for the Crown, I allowed the indictment to be amended by striking out the words 'Nine pounds sterling,' and substituting therefor the words 'a ten pound note' (2).

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(1) Before Sir Peter O'Brien, L.C.J., Palles, C.B., and O'Brien, Andrews, Johnson, Murphy, Holmes, Gibson, and Madden, JJ.

(2) The indictment ran as follows:—

"LARCENY.

"County of the City of Limerick,
"*To Wit.*
"Munster Winter Assizes, 1894.

"The Jurors for our Lady the Queen, upon their oath, present that Denis Hehir on the 20th day of September, in the year of Our Lord 1894, a Ten Pound Note, of the goods and chattels of one John Leech, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity."

"Evidence was given that John Leech, the master of the brigantine 'Uzziah,' which was then in Limerick, engaged the prisoner, Denis Hehir, to assist in the discharge of the cargo. On the 20th September last, Leech owed Hehir for work done in such discharge, the sum of £2 8*s.* 9*d.* For the purpose of paying this sum, Leech on said 20th September, handed the prisoner nine shillings in silver, and two bank notes, each of which both Leech and the prisoner believed at the time to be a £1 note. One of those notes was in fact a £10 note. The prisoner left, taking away the two notes with him. Within twenty minutes afterwards, Leech discovered his mistake, and went in search of the prisoner, whom he found within half an hour after he had given him the notes. Leech told the prisoner that he had given him a £10 note instead of £1. The prisoner alleged that he had already changed both the notes. There was evidence that, at the time when the prisoner first became aware that the note was for £10 (which was a substantial period after it had been handed to him by Leech), he fraudulently and without colour of right, intended to convert the said note to his own use, and to permanently deprive the said John Leech thereof, and that to effectuate such intention the said prisoner shortly afterwards changed the said note and disposed of the proceeds thereof.

"Mr. Bourke referred me to *The Queen* v. *Ashwell* (1), and *The Queen* v. *Flowers* (2).

"In order to have an authoritative decision upon the question, upon which the Court for Crown Cases Reserved in England was, in *The Queen* v. *Ashwell* (1), equally divided, I left the case to the jury, who found the prisoner guilty, and I reserved for this Court the question hereinafter stated. I allowed the prisoner to remain out on bail to come up for sentence at the next Assizes for the county of the city of Limerick.

"I request the opinion of this Court upon the question—'Whether I ought to have directed a verdict of acquittal by reason of the prisoner not having had the *animus furandi* when Leech handed him the £10 note?'

"C. PALLES."

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(1) 16 Q. B. D. 190. (2) 16 Q. B. D. 643.

The case was partially argued in Hilary sittings, and by direction of the Court was re-argued before the full Court at these sittings.

Gerald FitzGibbon, for the prisoner:—

The taking by Hehir was not *cum animo furandi* if it occurred when he first received the note, and that is the time of the true taking. "The intent to steal must be when it *cometh to his hands* or possession"; Co. 3 Inst. 47, p. 107. "*Furtum non est ubi initium habet detentionis per dominum rei*"; Glanv. lib. x. c. 13. "The felonious taking must must be of the possession and not of the property severed from the possession" . . . "the taking must be actual" . . . "by taking, and not bailment or delivery, for that is a receipt, and not a taking"; Co. *ub. sup.* All these point to a manual but not necessarily a conscious taking. The civil law is the same. "*Contractatio; id est, rei motio a loco*"; Heinecc. Elem. Jur., cited Hawkins P. C., 147. "*Qui putavit se rem attingere volente domino non tenetur furti*"; Pand. XLVII. 2. 12. *Reg.* v. *Mucklow* (1), and *Reg.* v. *Davies* (2), are directly in point. Hehir had the possession of the note during the interval between receipt and discovery, and could have recovered in trespass against any one taking it from him: *Armory* v. *Delamirie* (3). Anyone stealing the note during that time could have been indicted for larceny of the goods of Hehir: 1 Hale, P. C. 507. If Hehir had not the possession during that interval, who had? The note was not lost; Leech could only have had possession through Hehir, which is contrary to *Reg.* v. *Davies* (2); and if Hehir had any possession at all during the interval the conviction is wrong. In *Reg.* v. *Middleton* (4) six judges put this very point and decided in the prisoner's favour (p. 45); and Pigott, B., took the same view (p. 52). Trespass is a necessary element of felony: (Hawk. P. C. 143: Kel. 24). There is no trespass here, for the first taking was certainly not a trespass, nor could the second be, because it would be a taking by Hehir from himself. Therefore, as the first taking was neither a trespass nor a taking *cum animo furandi*, and as the subsequent discovery was neither a trespass nor a taking, there was nothing to support a conviction.

(1) 1 Moo. C. C. 160.
(2) Dears. C. C. 640.
(3) 1 Str. 505.
(4) L. R. 2 C. C. 38.

The prosecutor's proper remedy was an action for £9 money had and received after the changing of the note, or possibly to sue in detinue for the note prior to its conversion; but in the latter case he could only have recovered possession of the note on payment of £1, Hehir having a lien upon it for that sum. If Hehir could lawfully have insisted on changing the note and returning £9, the goods were not the goods of Leech; if he could not, he might have been convicted of larceny if he had changed the note, even though he returned £9. The law of finding does not apply to this case: *Reg.* v. *Davies*(1). Even if it did apply, *Reg.* v. *Thurborn*(2), *R.* v. *Preston*(3), and *R.* v. *Christopher* (4) are conclusive against the conviction.

Finally, the taking was not *invito domino*, for the mere intention to pass the property, though the property does not in fact pass, is sufficient to save the felonious taking: *R.* v. *Adams* (5); *R.* v. *Atkinson* (6); *R.* v. *Coleman* (7); *R.* v. *Jackson* (8); *R.* v. *Prince* (9). [GIBSON, J.: Were not all those cases overruled by *Cundy* v. *Lindsay* (10)?] No: for in that case the House of Lords held that there had been no delivery in fact to Blenkarn, and expressly reserved the question of the effect of a mistaken delivery into the hands of a felonious transferee; (per Lord Hatherley, pp. 468–9 and Lord Penzance, pp. 471–2). If the *animus furandi* can be postponed till the taker has time to appraise the value of the chattel taken, then a thief who ascertains in the daytime that what he took by night is of less value than he then believed, can exonerate himself by returning it to the owner, for *ex hypothesi* there can be no taking until the value is known, and at that time the hypothetical thief has no *animus furandi*. The decision in *Cartwright* v. *Green* (11) is ruled by the law relating to bailment and breaking bulk. In *Merry* v. *Green* (12) there was no delivery in fact of the purse and guineas, of the existence of which both vendor and purchaser of the bureau were unaware, and neither was there in that case any actual manual taking until they were discovered; there-

(1) Dears. C. C. 640.
(2) 1 Den. C. C. 397.
(3) 2 Den. C. C. 353.
(4) Bell, C. C. 27.
(5) R. & R. C. C. 225.
(6) 2 East, P. C. 673.
(7) 2 East, P. C. 672.
(8) 1 Moo. C. C. 119.
(9) L. R. 1 C. C. 150.
(10) 3 App. Cas. 459.
(11) 8 Ves. 405.
(12) 7 M. & W. 623.

fore that was a true case of finding. In any case these two cases were not decisions of this Court, or of any higher tribunal, and however entitled to respect, must not be allowed to affect the settled rule of law laid down by the Queen's Bench Division in *R.* v. *Mucklow* (1) in 1827; followed in *Reg.* v. *Davies* (2) in 1856; and recognised in 1882 in *Reg.* v. *Middleton* (3).

Bourke Q.C., and *Moriarty* for the Crown.

The question is, was there a taking and carrying away which constituted larceny. It is contended for the prisoner that the physical taking is what is meant, and that, if that act were innocent, no subsequent fraudulent conversion will amount to larceny. If this were so, a fraudulent appropriation by a servant would not be larceny. The reason why the conversion by a servant amounts to larceny is this: that notwithstanding his physical custody of the article, the legal possession of it remains in his master, and when the servant appropriates it, he takes the article out of that legal possession. It is then the felonious taking out of the legal possession of the owner that is larceny, even though the manual custody of the article have been innocently acquired. If the legal possession remains in the owner, notwithstanding delivery in fact by him, larceny may be committed: *Cartwright* v. *Green* (4); *Merry* v. *Green* (5). The *ratio decidendi* of these cases is—that there must be a prior legal possession legally acquired, to prevent a fraudulent misappropriation from being larceny. Did then the delivery in fact of the £10 note to the prisoner transfer the legal possession of it to him? Neither the owner nor the prisoner knew that the piece of paper contained the printed matter that made it a £10 note. There being neither intention or consciousness of giving or receiving a £10 note, did the physical transfer of the piece of paper transmute the owner's lawful possession into the prisoner's lawful possession? Is muscular action, unaccompanied by mental operation or consciousness, sufficient to transfer the legal possession of a chattel? The mistake was not one as to the value of the chattel, or as to its quality, but as to its

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(1) 1 Moo. C. C. 160.
(2) Dears. C. C. 640.
(3) L. R. 2 C. C. 38.
(4) 8 Ves. 405.
(5) 7 M. & W. 623.

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identity. It was a delivery of one article where the intention was to deliver a different one. On no legal principle can it be decided that the lawful possession, any more than the legal property, passes in such a case.

Cases of finding of lost articles well illustrate the principle that larceny is committed, unless the prisoner had innocently acquired the legal possession before he appropriated the article. The finder of lost goods acquires, by the mere act of finding, a special property in the goods found, and holds a legal possession of them, defeasible only on discovery of the rightful owner. It is by virtue of such legal possession, innocently acquired, that fraudulent misappropriations by the finders have been, in such cases, held not to amount to larceny: *Reg.* v. *Thorburn* (1); *R.* v. *Glyde* (2). But if the finder know the owner, he does not acquire any property in, or legal possession of the goods, and therefore it has been held that in such cases his appropriation of them constitutes larceny: *R.* v. *Moore* (3); *Reg.* v. *Middleton* (4). The cases of *R.* v. *Mucklow* (5), and *Reg.* v. *Davies* (6) are not reconcilable with *Cartwright* v. *Green* (7), and *Merry* v. *Green* (8), and therefore cannot be regarded as satisfactory decisions.

Cur. adv. vult.

June 24.

MADDEN, J.:—

In this case the prisoner Denis Hehir was indicted for the larceny of a ten pound note, of the goods and chattels of one John Leech. It appears from the evidence that this £10 note was handed by Leech to Hehir in part payment of a sum of £2 8*s.* 9*d.* due by the former to the latter, and that at the time when it was so handed, both Leech and Hehir believed it to be a £1 note. It further appears that after the lapse of a substantial period of time, Hehir became aware that the note was one for £10, whereupon in the words of the case "he fraudulently and without colour of right intended to convert the said note to his own use, and to permanently deprive the said John Leech thereof, and that to effectuate such intention the said prisoner shortly afterwards changed the said note, and disposed of the proceeds thereof."

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(1) 1 Den. C. C. 387.
(2) L. R. 1 C. C. 139.
(3) L. & C. C. C. 1.
(4) L. R. 2 C. C. 38.
(5) 1 Moo. C. C. 160.
(6) Dears. C. C. 640.
(7) 8 Ves. 405.
(8) 7 M. & W. 623.

The case was left by the Lord Chief Baron to the jury (who found the prisoner guilty), in order to obtain an authoritative decision upon a question upon which the Court for Crown cases reserved in England was equally divided in *The Queen* v. *Ashwell* (1). That question he reserved for this Court in the following words, "Whether I ought to have directed a verdict of acquittal by reason of the prisoner not having had the *animus furandi* when Leech handed him the £10 note?"

The conviction in *The Queen* v. *Ashwell* (1) stood affirmed, the Court being equally divided, consequently the conviction in the present case is good under the common law of England. This is a circumstance to be borne in mind, for (as was remarked by one of the Judges in *The Queen* v. *Middleton*) (2) the common law of larceny in both countries being the same, it is desirable that the decisions should be the same. But it is still more important that the criminal law in Ireland should be administered in accordance with the judgment of this Court, and I do not think that I am absolved by the result of the *Queen* v. *Ashwell* (1), from the duty of forming an independent judgment upon the question involved in this case.

The answer to the question reserved depends on the result of the inquiry;—does the evidence show a taking of the £10 note by Hehir, *invito domino*, under such circumstances as would sustain an action of trespass? If it does not, then beyond all doubt, an essential element in the crime of larceny at common law is wanting and the prisoner ought to have been acquitted; for in the words of Hawkins (Pleas of the Crown, Book i., chap. 33, sect. 1), all felony includes trespass, and every indictment of larceny must have the words *felonice cepit* as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of trespass in carrying them away.

If the handing of the note by Leech to the prisoner, under the circumstances of this case, amounted to a delivery, transferring legal possession, no fraudulent intention on the part of the

(1) 16 Q. B. D. 190. (2) L. R. 2 C. C. 38.

prisoner, subsequently formed, although carried into effect by actual conversion of the note to his own use, would suffice to constitute the crime of larceny at common law. Such a fraudulent conversion, though reprehensible, could not be a taking involving trespass, inasmuch as the chattel would, in this assumption, be in the legal possession of the prisoner by reason of its delivery. Was there, then, a delivery to which any legal consequences can be attached? There was a physical transfer of a certain chattel from Leech to the prisoner, and the ordinary transactions of mankind could not be carried on if such a transfer were not *prima facie* a delivery of the chattel, with a consequent change of legal possession. But although men are presumed to know what they are doing, and intend the consequences of their acts, the contrary may be proved, and we must deal with this case on the assumption that when Leech transferred this chattel to the prisoner they both believed it to be something different from what it actually was, and that their intention was to transfer a piece of paper representing one sovereign, not a piece of paper representing ten times that amount of gold.

I have now reached what I consider as the crucial question as regards this branch of the case; does a transfer of physical possession, made under and in consequence of such a mistake, amount to a delivery, so as to affect a change of legal possession? I am of opinion that a transfer made under such circumstances can pass neither property nor legal possession. I do not mean to say that in all cases where delivery of a chattel is made under a mistake common to both parties to the transaction it is inoperative to transfer legal possession; for example, A may deliver a £10 note to B, and B accept it under a common mistake as to the amount due by A to B. They may have believed the amount due to be £10, whereas in fact it was only £5. But there was an intelligent delivery and receipt of a £10 note, as such, capable of transferring legal possession; and if B, on discovering the mistake, misappropriated the balance, he would not be guilty of larceny at common law. Nor do I think that a mistake as to the money value of the chattel transferred is of the same nature as that which occurred in the present case. A may deliver to B, in discharge of a trifling obligation, an old battered copy of Shakespeare printed in 1623, both innocently believing at the time that being old, full of errors and misprints and badly spelled, it would only fetch a couple of shillings at an auction. Suppose B to sell it to a collector for several hundreds of pounds and to appropriate the proceeds, he would not be guilty of larceny, inasmuch as there was an intelligent delivery of the chattel, as such, though under a mistake as to its value. In these cases the owner intends the specific property to pass, though he would not so intend did he know the real facts. No subsequent misappropriation could amount to larceny. The *dominus* is not *invitus*, but *volens*. But the case is totally different when there is a delivery under a mistake as to the identity either of the transferee or the chattel transferred. In such a case, in the language of Lord Coleridge, in *The Queen* v. *Ashwell* (1), "There is not in law any more than in sense a delivery and a receipt, unless the giver and the receiver intend to give and receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, and not a mere physical fact from which intelligence and even consciousness are absent": *The Queen* v. *Ashwell* (1), at p. 224.

In *The Queen* v. *Ashwell* (1) some, at all events, of the Judges who were of opinion that the prisoner was not guilty of larceny, appear to have treated the mistake—in that case between a shilling and a sovereign—as one not of identity, but of value. Mr. Justice Stephens thus states the view from which he dissents: "It is said, first, that the delivery being made under a mistake, passed neither the property in the sovereign nor the right to the possession of it, and that the prisoner must be regarded as having taken it, not when he accepted it under a mistake as to its value, but when knowing its value he determined to appropriate it to himself, or when he did so appropriate it by getting it changed, in keeping the change." Speaking for myself, I rest my judgment upon the proposition, that the mistake in the present case—and I should say in *The Queen* v. *Ashwell*—was one not of value but of identity. The chattel transferred had no intrinsic value. What is present in the mind on the delivery of a bank note is not the paper, *per se*, but the money which it represents, and into which it is convertible. It would take some argument to persuade me that one sovereign is the same identical thing in *rerum naturâ* as a pile of ten sovereigns, and I think the notes by which they are represented are essentially different also. The case would appear plainer if exchange were carried on here, as in some countries, by means of shells, or precious stones, each essentially different in nature as well as in conventional value, and if one of these stones had been mistaken for another. But looking at the substance and reality of the transaction as present to the minds of both parties, I think mistake between a £10 note and a £1 note is one of precisely the same character.

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(1) 16 Q. B. D. 190.

If I am right in regarding the mistake as one of identity, and not merely of value, it appears to me clear upon the general principles of our law, and indeed of all jurisprudence, that a consent given, a contract entered into, or an act done, under, and in consequence of, such a mistake can have no legal consequences whatever. This would clearly be the law with regard to a contract for sale of a chattel, where a mistake occurred as to the identity of the purchaser: *Cundy* v. *Lindsay* (1); and to import a different principle into our criminal law would, in my opinion, instead of tending to simplification, introduce confusion and contradiction into the administration of justice.

I now proceed to consider how far this branch of the case is governed by authority. I confess that I can see no substantial distinction between a mistake as to the subject-matter of a transfer and a mistake as to the identity of the transferee. In *R.* v. *Mucklow* (2) the prisoner misappropriated a draft delivered to him by mistake which was intended for another person of the same name. He was convicted of larceny, but the conviction was quashed on the groud that the prisoner had not *animus furandi* when the draft was delivered to him. This case was followed in *The Queen* v. *Davies* (3). These cases are, to my mind, plainly inconsistent with the conclusion at which I have arrived. But they are also inconsistent with the case of *Merry* v. *Green* (4), between which and the present case I can see no substantial ground of distinction. In that case a bureau was sold and delivered to the defendant, who subsequently found in a secret drawer a purse containing money which he fraudulently appropriated to his own use. It was held that though there was a delivery of the bureau to the defendant, there was no delivery of the contents of the secret drawer, so as to affect a change of legal possession, both parties to the transaction being ignorant of their existence. Now, there was in that case, as in the present, a transfer of physical possession, in the only way in which the possession of one article enclosed in another can possibly be transferred; and this I take to to be the view of Stephens, J., in *The Queen* v. *Ashwell* (1), while following *R.* v. *Mucklow* (2), he regards the delivery in both cases as the same in character. "It is difficult to say why the delivery of a letter should operate as the delivery of notes enclosed in it, whereas the delivery of a bureau does not operate as delivery of its contents."

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(1) 3 App. Cas. 459.
(2) 1 Moo. C. C. 160.
(3) Dears. C. C. 640.
(4) 7 M. & W. 623.

The only distinction that I can see between the present case and *Merry* v. *Green* (3) is that the delivery there took place in ignorance of the existence of the chattel in question, here under a mistake as to its identity. This, however, appears to me a distinction without a real difference, for in neither case was there any intelligent act. The ground upon which, in *Merry* v. *Green* (3), it was held that there was no delivery so as to transfer legal possession was that the vendor had no intention to deliver, nor the vendor to receive, the purse and money, both being ignorant of their existence. There can be no intelligent delivery of a chattel or consent to its transfer when both parties either believe it to be something different from what it is in fact, or are ignorant of its existence. In either case the *dominus* remains *invitus*, for the element of intelligent volition is wanting.

The cases of *Cartwright* v. *Green* (4), and *Reg.* v. *Middleton* (5), are less directly in point than *Merry* v. *Green* (3) inasmuch as the question of bailment was involved in the former, and in the latter the prisoner had *animus furandi* at the time when he obtained physical possession of the chattel. In *Riley's Case* (6) the inception of the transaction was not delivery, but a taking of the

(1) 16 Q. B. D. 190.
(2) 1 Moo. C. C. 160.
(3) 7 M. & W. 623.
(4) 8 Ves. 405.
(5) L. R. 2 C. C. 38.
(6) Dears. C. C. 149.

chattel without any knowledge whatever on the part of the owner. In *Vincent's Case* (1) it was held that where a bailee parts with his special property under a mistake, the property is not divested, and that if the chattel be stolen, his property may be laid in the bailee, Pollock, C. B., stating that "it is a misapprehension to suppose that where possession of property is parted with by mistake, the rights of the owner are affected." Although these cases are not precisely in point, the principles upon which they were decided seem to be more in accordance with the contention of the Crown than with the argument on behalf of the prisoner. This remark applies also to the decisions upon which the modern law of theft by finders is founded. I do not think, however, that much assistance can be derived from those authorities. This branch of criminal law is based upon legal assumptions as to the mutual relations of the owner and finder, necessary no doubt for its development, but which have but little relevance in a case like the present, where physical possession passed by actual manual delivery.

The question remains, assuming the *dominus* to be *invitus*, and the delivery to be inoperative to effect a change of legal possession, was there any felonious taking, or any taking at all, having regard to the circumstance that such taking, if it had any existence, occurred subsequently to the actual taking, and while the note was in the physical possession of the prisoner. Upon this branch of the case reliance was placed on behalf of the prisoner upon a passage in the judgment in *Reg.* v. *Middleton* (2) dealing with a case put in argument, closely resembling the present;—that of a person handing a cabman a sovereign in mistake for a shilling. The test is thus stated, "whether he (the cabman) at the time he took the sovereign was aware of the mistake, and had then the guilty intent, the *animus furandi.*" In estimating the value of the dictum which I have quoted, and its application to the present case, it is necessary to have regard to the facts of the case before the Court, which was thus illustrated by the case of the cabman. In *Middleton's Case* (2) the question under consideration was as to the effect of knowledge and guilty intention coincident with the actual physical taking, and the Judges had not before them, and cannot be supposed to have contemplated, a state of facts such as that which occurred in *Merry* v. *Green* (1), *The Queen* v. *Ashwell* (2) and the present case.

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(1) 2 Den. C. C. 464.
(2) L. R. 2 C. C. 38.

The circumstance that the alleged felonious taking in *The Queen* v. *Ashwell* (2) was not contemporaneous with the actual physical taking, appears to have largely affected the judgment of Mathew, J. Referring to the argument on behalf of the Crown, he says: "This means that though the defendant did not take in point of fact, he ought by a fiction to be treated as having done so in point of law, in order that he may be punished as a thief" (p. 205). But this is not the only instance in which a felonious taking, amounting to a trespass, may be effected by a person already in physical possession of a chattel. It is sufficient to instance the case of a servant feloniously appropriating an article in his custody under circumstances sufficient to render his possession the legal possession of his master. The taking in such a case appears to partake quite as much of a legal fiction as in *The Queen* v. *Ashwell* (2), and in the present case. But, if we are to disregard legal subtleties, would it not to the ordinary mind, savour even more of legal fiction, and appear less consonant with common sense, to say that Hehir never took £10 without the consent of Leech, than to say that he took £10 when he conceived and carried into effect the idea of fraudulently appropriating the note to his own use?

It is well said by Mathew, J., that it is desirable that the rules by which guilt and innocence are to be determined should be susceptible of ready comprehension and easy exposition. The rule in accordance with which the present case ought, in my opinion, to be decided is certainly capable of easy exposition, and, I believe, of ready comprehension. It may be thus stated: A man to whom a chattel is delivered under a mistake as to its identity, does not thereby acquire legal possession; and if he subsequently discovers the mistake, and fraudulently misappropriates it to his own use, he is guilty of larceny. A rule so short and simple appears to me to be equally adapted to the compre-

(1) 7 M. & W. 623.

(2) 16 Q. B. D. 190.

hension of the average thief, and to the moral sense of the honest citizen: and believing it to be in accordance with principle and authority, I am of opinion that the conviction should stand.

GIBSON, J.:—

That there should be such a remarkable diversity of judicial opinion upon the question of liability for misappropriation of property delivered under mistake of identity—a point which ought to be elementary in criminal law as it is in civil law and in morals—is not creditable to our jurisprudence, though it need not excite surprise in any one acquainted with the history and character of our case-made law, abounding as it does in arbitrary exceptions and intangible distinctions, without any clear foundation in principle or common sense. That the rules determining guilt and innocence ought to be easy to understand and simple to explain, all will agree; but a perusal of *Middleton's Case* (1) and *Ashwell's Case* (2) must produce the disheartening conviction that the law of larceny is very far from satisfying that requirement.

Difficult and obscure as it is in many respects, the common law still is a living system which Judges have every day to adapt and apply to the innumerable problems and complex relations of modern life, and it is the duty of our Courts, where they can, to eliminate error, when not inveterate, and to retrench anomaly. Accordingly, in *Middleton's Case* (1), notwithstanding the strong opinions of the dissentient Judges, the majority of the Court overruled what had been accepted as law for a century, supported by the authority of at least three cases—*Coleman's Case* (3); *Atkinson's Case* (4); *Adam's Case* (5)—and laid down that larceny could be committed in respect of a chattel the property in which the owner intended to transfer, if the property did not actually pass by reason of there being no effectual contract. So in *Dee's Case* (6) (since recognised as law in the statute of 1885) the Irish Judges disregarded a great body of old and modern authority as contrary to principle and unsound. In the present case, the weight of authority is not adverse; and we are free to decide in accordance with principle and reason, looking at the reality of things.

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(1) L. R. 2 C. C. 38.

(2) 16 Q. B. D. 190.

(3) 2 East, P. C. 672.

(4) 2 East, P. C. 273.

(5) R. & R. C. C. 225.

(6) 14 L. R. Ir. 468.

What we have to deal with is common mistake of identity of such a character as excludes the mutual assent necessary to the existence of contract. That the subject matter is money can make no difference in this respect. No doubt if the taker cashed the note, and gave the owner back the change, his conduct in so doing would displace *animus furandi.* But on the question of consent and no consent, on which the determination of trespass depends, I cannot discern any substantial difference between a bank note and any other chattel. A bank note indorsed by the Duke of Wellington might have a fancy value, and a person getting it by mistake could hardly insist on holding it, if he chose to pay the difference in face value.

For the purpose of the inquiry I shall assume it as unquestionable law that, as a common law offence, larceny involves an unlawful violation of possession, and that it cannot be committed where possession has been acquired in its origin lawfully. I shall confine myself to two points: the first, the effect of mistake—considered from the receiver's side—on the acquisition of possession: the second, the effect of mistake—considered from the owner's side—on the question of the lawfulness of such acquisition. The solution of both these questions ultimately must depend on the effect and meaning of consent of the taker on the one hand and of the owner on the other, but it is convenient to discuss them separately.

First, as to the acquisition of possession. What is to be examined is legal possession, as distinct on the one hand from physical or apparent possession, sometimes called custody or detention, and on the other from right to possess or ownership. A man is holding an umbrella, he may have it as owner, thief, or servant. So far as external appearances go, there is no difference, yet as owner or as thief he would be in legal possession; as owner, he would be in lawful possession; as servant, he would not be in possession at all. Why is this? Because possession denotes, in addition to a material, a legal and mental relation. In Roman law, possession meant the occupation of anything with the intention of exercising rights of ownership in respect of it. *Apiscimur possessionem animo et corpore, neque per se animo aut per se corpore* (Dig. 41, 2, 3, 1). The definition in Sir J.

Stephen's Digest also introduces the element of intention. I have no doubt that in English law physical occupation is not identical with possession. If it were, a servant would be possessed of his master's chattel, whereas we know that the possession is the master's. The analysis of the legal conception of possession, though to a lawyer familiar, wears an appearance of subtlety; but in real property cases I have never found any difficulty in conveying to a jury how acts, physically identical, may be distinguished, according to the rights, relations, intent and circumstances of parties, as vesting or divesting possession, or as not having that effect: *Leigh* v. *Jack* (1); Pollock and Wright on Possession, *passim*. For some purposes, and in some relations, as in case of trespass, *Riley's Case* (2), apparent possession may be tantamount to legal possession as possession may be relative. As a general rule, however, legal possession imports knowledge and consent. When Joseph replaced in his brethren's sacks, without their knowledge, the price of the corn they had bought, though they had apparent dominion and control over the sacks with their contents, they were no more, before discovering it, in possession of the money which Joseph had put in by an act of trespass, than they would have been of dynamite secretly placed there.

The following illustrations relate to each branch of the inquiry, that is, not only to the acquisition of possession, but to its lawfulness, and exhibit the thin and insufficient distinctions, which, in the opinion of some, divide criminal from civil wrong doers. In each illustration it is supposed that the taker at the moment of discovery misappropriates *animo furandi*.

1. A servant is told by his master he may take and keep for himself an old suit; by mistake he takes a new one.

2. A lady at a crowded ball accidentally and without negligence brushes off from another lady's dress a diamond spray, which is caught in her own dress. On returning home she finds the jewel, and knows the owner. The physical but not the legal possession is altered by the act, which is unconscious. The lady is not a trespasser: *Stanley* v. *Powell* (3). There is no mistake on either side.

3. A gentleman at a club by mistake puts his cigar-case into another member's coat in the hall. The member afterwards

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(1) 5 Ex. D. 264. (2) Dears. C. C. 640. (3) [1891] 1 Q. B. 86.

putting on his coat, carries off in it the cigar-case; on finding it, he knows the owner. Is not this a case of mislaying rather than of losing?

4. A master gives his valet a present of a coat, in the pocket of which he has forgotten a purse with £50.

5. A solicitor is sent by a client a bundle of papers, among which there is by mistake a foreign negotiable bond, and a box of title deeds in which a packet of bank notes has been mislaid.

6. A messenger delivers a circular, into which a money-letter has accidentally slipped.

7. An optician's messenger calling at a customer's house for a parcel containing glasses, is mistaken by the owner for a jeweller, and given a parcel containing diamond studs.

8. A jeweller hands a purchaser a valuable ruby in mistake for a cheap carbuncle which is the subject of sale. It ought not to make any difference whether the stone is covered in a case or not, or whether the mistake is as to the contents of the case, or as to the identity of the stone.

In the two latter cases, would it make any difference if the mistake was made by the owner's servant?

In certain of the above illustrations some judges will say that the taker is manifestly a thief, in others that he is manifestly innocent. My intellect is not sufficiently subtle to appreciate any solid distinction whether the owner puts into a wrong coat or box or into a wrong hand. In cases 2 to 6 I think it is certain that possession is taken when and only when the taker finds the chattel, and that he takes *invito domino* at common law if he then and there wrongfully converts it, knowing the mistake and the owner. In each of these five cases the taker would be protected against the owner, if he destroyed, lost, or delivered the unknown chattel in *bona fide* ignorance of its existence.

In the present case there was a physical delivery, in intended performance of a contract, without knowledge or intent on the part of the owner to give, or on the part of the taker to accept, possession of the particular chattel actually delivered. Until discovery by the taker, the legal possession seems not to be divested out of the owner, if it be not in suspense. Until knowledge and election, the law ought not to attribute to the taker an intent to divest the owner's possession without his consent—which would be a wrongful act, or to accept a possession which in case of some chattels might be onerous. The physical occupation raises an inference of legal possession, just as it does of property of which possession is part and symbol, but common error, which rebuts contract, also rebuts that inference. The character of the physical possession is ambiguous until discovery, and ought to be interpreted in an innocent rather than a tortious sense. If, upon discovery, the taker elects to return the chattel to the proper custody, as it is his duty to do, his previous relation to the chattel is thereby determined as resembling custody rather than possession. On the other hand, if he then decides to misappropriate, knowing that there has been no consent by the owner, one of two views is possible. His possession up to that time may be regarded as incomplete, and is then finally determined by his tortious election as wrongful throughout: *Woodward's Case* (1). Or he may be regarded as then and there for the first time taking out of the owner's possession the chattel which is to be considered as mislaid rather than as lost. During the suspense period, his acts done in innocent ignorance are excused, but the excuse, founded not on consent but on misleading applies only as far as he is misled, and does not operate when, knowing the mistake, he deliberately commits a tort by taking possession of and converting the chattel.

The second question for consideration is the lawfulness of possession, where the delivery has taken place under a common mistake of such a character as to exclude the mental agreement necessary to the formation of a contract. The mistake may be as to the identity of the transferee: *Cundy* v. *Lindsay* (2), or as to the identity of the subject-matter of contract as in *Middleton's* and *Ashwell's Cases*, or a mistake compounded of both these elements.

It may be taken that a consent to possession obtained by fraud or force, *animo furandi*, is unavailing, and that possession under it would be unlawful and trespassory. It is also certain that in such a case as we have here to deal with, property cannot pass. If common mistake prevents contract, and property cannot pass, why should possession, which is part and symbol of property, pass when neither party intended to divorce possession from property?

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(1) L. &. C. 122.

(2) 3 App. Cas. 459.

Physical delivery by owner to taker may be evidence of consent; but delivery can hardly be conclusive and irrebuttable proof of an intelligent transfer of possession, when neither party intends to make or accept such transfer.

Apart from *Ashwell's Case* (1), I am aware of no direct authority on this point. In *Middleton's Case* (2) the majority of the Court thought that possession was taken *invito domino*, because, though no fraud was practised, the prisoner at the moment of delivery was aware of the mistake, and had *animus furandi* (3). On consideration I think that *animus furandi* is distinct from, and is not a necessary part of, trespass, and that, even without *animus furandi*, a taker, who at the instant of delivery is aware of the mistake, cannot rely on a consent which he then knows did not in any true sense exist. If the origin of his possession is trespassory, subsequent misappropriation would make him a felon. Why is it that the knowledge of the owner's mistake by the taker prevents his relying on consent? It is not because the taker acts fraudulently, for he may have no dishonest intent, but because in that case the taker is not misled.

I agree with Baron Bramwell, in *Middleton's Case* (4), that the state of the owner's mind as to consent cannot be governed by the state of the taker's mind as to knowledge of mistake or felonious intent. Take the following illustrations:—

1. A principal receives from an agent a £10 note in mistake for a £5 note. He sees the mistake and says nothing, intending, without any felonious intent, to give the agent a fright for his carelessness. He afterwards keeps and dishonestly converts the note.

2. A principal to test his agent's honesty hands him a £10 as if in mistake for a £5 note; the agent believing that the principal is really making a mistake dishonestly keeps the note. In these cases how can the consent of the owner depend on the knowledge and intent of the taker?

This question of consent is one of substance and not form; it cannot be treated as disposed of by the fact of physical delivery without more. A delivery by a man in delirium or asleep, or hypnotised, would be void because unaccompanied

(1) 16 Q. B. D. 190.
(2) L. R. 2 C. C. 38.
(3) L. R. 2 C. C. 43.
(4) *Ibid.* 56.

by intelligent volition. The mistake, as it occurs to me, made by many of the learned Judges in *Ashwell's Case* (1) seems much the same as that which was corrected in *Reg.* v. *Dee* (2). A consent must be to the particular act or thing and to the particular person. A consent to intercourse obtained by fraudulent personation from a married woman in the belief that the act was marital connection with her husband was, as there pointed out, no consent at all to an act of adultery with a stranger. This absence of consent does not I think depend on fraud. It is a conceivable case that a married woman might, in the dark, submit to a man whom she believed to be her husband, without guilty intent on his part, from a mistake of rooms or otherwise. In a civil action for assault I doubt that he could justify his possession of the woman by leave and license, though of course from absence of *mens rea* he would not be guilty of rape.

It may however be said that, irrespective of consent, if the taker of a chattel delivered under mistake is protected by a kind of estoppel, he is to be deemed, as against the owner, to be lawfully in possession while such estoppel continues, that is, until the mistake becomes known to him. This suggestion (which has caused me more difficulty than any other point) I think is founded partly on a confusion of physical possession or custody with legal possession, and partly on a misunderstanding arising from the use of the word estoppel—an expression which it is likely to cause misconception. Until discovery, the relation of the taker to the chattel, which he holds without consciousness of its identity, is, against the owner, custody or detention only. So far as he has acted under the mistake, he is protected. This protection extends to his custody of the chattel and to his conduct in parting with the chattel if he has done so. The delivery under mutual mistake of identity does not work an estoppel in the sense that the property must be taken to pass. But the taker is excused in respect of everything attributable to the mistake for which the owner is responsible. While the chattel remains in the taker's hands he is under a duty to give it up on demand. His detention of the chattel till discovery is lawful; but it is not necessary for his protection that such physical detention should be enlarged into

(1) 16 Q. B. D. 190. (2) 14 L. R. Ir. 468.

possession, though, if he had parted with the chattel in ignorance, he would be protected even as to the property, notwithstanding that by reason of the non-existence of contract, the property had not passed to him. It appears to me that the lawfulness of the detention while the mistake as to identity continues does not draw with it as a consequence that upon discovery the taker can lawfully turn detention into possession and appropriate the chattel. The protection given to mistake does not extend to fraud. There are many cases in which a taker would be under no responsibility or duty to the owner where wilful misappropriation on discovery would seem to be theft. Take the illustrations already given. If the coat with the cigar-case, or money in the pocket, or the circular with the money-letter accidentally slipped inside, was lost, or destroyed, or given away, no liability is incurred by the taker in respect of the unknown chattel, if the taker acted in ignorance; yet in each case wilful misappropriation on discovery would be, I think, larceny. So if the taker, in the bureau cases, had by his neglect lost or destroyed the bureau, he would not have been liable in damages for the hidden contents of which he knew nothing, and as to which he was under no duty; but when he found and took the contents, *animo furandi*, he would be a thief. The protection seems founded not so much on what is commonly called estoppel as on the principle that one cannot complain of a wrong of which he is himself the cause and where he is owed no duty by the other party.

I express no opinion on the question of bailment, which could only be argued on the ground that the prisoner as custodian of the chattel was on discovery under a legal obligation to re-deliver it on demand. The point has not been argued, and I have not thought it necessary to consider the cases bearing on the subject, such as *Vincent's Case* (1), and *M'Donald's Case* (2).

A word as to the authorities. Of the seven principal cases relating to the question of mistake and possession, that is to say, the two bureau cases, the two post-office cases, *Vincent's Case* (1), *Middleton's Case* (3), and *Ashwell's Case* (4); only two decisions, that is, the post-office cases, tell against the view here taken. The second

(1) 2 Den. C. C. 464.
(2) 15 Q. B. D. 323.
(3) L. R. 2 C. C. 38.
(4) 16 Q. B. D. 190.

of those cases merely followed the first; they were both decided without argument, and the reasons for the judgment can only be inferred. Mr. Justice Stephen in his Digest, *Art.* 299, and Mr. Justice Cave and other Judges in *Ashwell's Case* (1) are of opinion that the bureau cases are in direct conflict with the post-office cases. Whether this is so or not, I prefer the reasoning of Lord Eldon and Baron Parke to the unargued conclusions in the latter cases, and in my view that reasoning clearly touches the facts before us. In addition to these two decisions, Mr. Fitz Gibbon also relied strongly on the well-known illustration in *Middleton's Case* (2). An explanation of the passage is attempted by Mr. Justice Wright (Possession, p. 207), and before us Mr. Bourke suggested that there was an ambiguity as to what the taking by the cabman contemplated in the illustration meant. In any view, however, the *dictum* cannot bind this Court. It was not necessary to the decision; the case was not argued apparently with reference to such authorities as the bureau case or *Riley's Case* (3); and the misconception of the nature of consent which prevailed before *Reg.* v. *Dee* (4) will be seen to affect many of the judgments. Counsel for the Crown in support of the conviction relied on the judgments and reasoning in the bureau cases, some of the reasoning in *Middleton's Case* (2) and in *Ashwell's Case* (1), the conviction in which is supported by the opinions of Sir F. Pollock and Sir R. S. Wright in their very learned and acute treatise on Possession from which I have derived much assistance. The same conclusion is also reached in an American case: *State* v. *Ducker* (5), decided unfortunately only by a single Judge. As to the cases upon the finding of lost property, I do not think that they are directly in point as the chattel here was not lost. I have some difficulty in reconciling their doctrine, as to the necessity of *animus furandi* being simultaneous with the taking, with *Riley's Case* (3) that trespass followed by subsequent felonious misappropriation is theft unless the explanation be that *animus furandi* in the former cases is essential to trespass. Nor do I quite see how the reasonable belief of the finder as to the owner being found is a necessary ingredient in trespass at common law where the finder takes with the intent of converting to his own use whether the owner is found or not, *animo furandi*, and not for the purpose of safe custody. My opinion is summarised in the following propositions:—

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(1) 16 Q. B. D. 190.

(2) L. R. 2 C. C. p. 45.

(3) Dears. C. C. 149.

(4) 14 L. R. Ir. 468.

(5) 34 Am. R. 590.

1. Where delivery takes place under such common error as displaces contract, then, as between owner and taker, the owner cannot be deemed to be dispossessed or the taker possessed, until discovery and election by the latter, the intermediate relation of the taker to the chattel, as against the owner, being excusable detention only.

2. Where delivery takes place in intended performance of a supposed contract to transfer property, if, by reason of common error and absence of mutual assent the property does not pass, the owner's possession, which neither party intended to deal with as detached from property, is not lawfully divested as between the owner and the taker.

3. The owner's consent, necessary to legalise possession on transfer, must be an intelligent consent to the transfer of the particular chattel to the particular person.

4. A taker dealing with a chattel taken under such common mistake is, while the mistake continues, protected (*e. g.* suppose Hehir had paid away the note in ignorance as a £1 note), but upon discovery when the chattel is still in the taker's custody the protection disappears; there is a continuous duty to deliver the custody on demand, and the taker cannot protect his wrongful assumption of possession by a consent, which he knows the owner never gave.

5. Consent must be ascertained exclusively from the state of the owner's mind; and the state of the taker's mind can only be material as to his being misled, criminal intent, and assumption of possession.

6. The taker assuming possession on discovery of the mistake, and converting to his own use, *animo furandi*, commits larceny.

Legal principle and weight of authority, I think, and common sense and reason, I believe—if I may be excused for introducing such matters into the discussion of a common law offence—point in favour of conviction. Following their guidance I must decide that Hehir, who is morally a rogue, is legally a felon according to the law of this kingdom.

HOLMES, J.:—

Following the exhaustive judgments that have been delivered by my brothers, Gibson and Madden, with whom I am in entire agreement, it is unnecessary for me to deal with this case at any length.

The question for our decision, practically identical with that considered in *The Queen* v. *Ashwell* (1) is shown by the difference of opinion amongst the Judges in that case to be *inter apices juris.* The limitations of the crime of larceny under the common law are neither symmetrical nor scientific; but such as they are, it is our duty to adhere to them. From time to time new kinds of larceny have been created by statute; and if the present law is defective, it can be corrected by the Legislature without the assistance of the Court for Crown Cases Reserved. I therefore approach the consideration of this case, with my mind free from any prepossessions. As far as I can gather, the difference of opinion amongst us is confined to a single point—was there a giving possession of the £10 note by the prosecutor and a taking of it by the accused, at the time when the former handed it to the latter. If there was, there ought to have been a verdict of not guilty. If there was not, the offence charged was committed.

The proposition that a person, who is given the manual custody of goods by the owner, cannot be treated as a trespasser by reason of a subsequent act on his part, is simple and intelligible; but, it is not accepted by our law. A servant who, after having received without any guilty intention a chattel from his master to be employed in the service, or dealt with according to the directions, of the latter, fraudulently converts it to his own use is undoubtedly a trespasser and thief at common law. Once this is admitted, it follows as a necessary inference that to constitute such a giving of possession as excludes from the taking the possibility of trespass and larceny, something more is required than mere manual or physical delivery. I cannot conceive in what this "something more" consists, if it be not the mental intention that accompanies the outward act. On this point, I adopt the words of Lord Coleridge. "It seems to me very plain, that delivery and receipt are acts into which mental intention enters, and that there is not in law, any more than in sense, a delivery and receipt, unless the giver and receiver intend to give and receive respectively what is

(1) 16 Q. B D. 190.

respectively given and received. I hope it is not laying down anything too broad and loose, if I say that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this, is to expose the law to very just but wholly unnecessary ridicule and scorn." If this proposition is correct—a proposition which certainly does not involve the creation or acceptance of a fiction—it ends the controversy. The prosecutor did not intend to give, or know that he was giving; the accused did not intend to receive or know that he was receiving the particular piece of paper that passed from the one to the other. The latter was not a trespasser on getting the custody of it. He was in the position of a man into whose pocket the chattel of another had fallen accidentally without his knowledge; in both cases the possession of it remains in the owner, and the person who unconsciously has control over it cannot be guilty of a wrongful act in regard to it, until he knows he has it. Once he discovers that he holds a chattel which the owner had never intended to part with, he takes it for the first time. Whether such taking is innocent or felonious depends upon his then state of mind, which is always a question for the jury, and which it must be assumed, in the present case, was found against the prisoner. I am therefore of opinion that he was rightly convicted. In arriving at this conclusion I have derived little assistance from previous decisions. I admit that the view I have taken is inconsistent with *R.* v. *Mucklow* (1) and *Reg.* v. *Davies* (2). It would no doubt be possible for me to distinguish those cases from the present; but I feel that the distinction would be fanciful and unreal. On the other hand, I, like Cave, J., am unable to reconcile those cases with *Cartwright* v. *Green* (3), and *Merry* v. *Green* (4); and if I am to choose between conflicting authorities, I prefer to accept those in which the judgment of the Court was preceded by argument, and enforced by the reasons on which it was founded. Under the circumstances, however, legal principle affords a still better guide, and believing that the proposition laid down by Lord Coleridge, which I have

(1) 1 Moo. C. C. 160.
(2) Dears. C. C. 610.
(3) 8 Ves. 405.
(4) 7 M. & W. 623.

already quoted, is as sound in law as it is good in reason, I have no hesitation in acting on it.

MURPHY, J.:—

As to the moral aspect of the defendant's conduct in this case, it is clearly and admittedly just as bad as if he had picked the owner's pocket; but it is said that, in consequence of the means by which he got the possession that enabled him to commit this dishonest act, he is not liable.

Now in the case, which was exactly similar to this, except that the amount of money was not the same, *Reg* v. *Ashwell* (1) a gentleman of the name of Ashwell being in distress in the neighbourhood of a public-house, asked an acquaintance named Keogh to lend him a shilling; Keogh, with unintentional liberality, gave him a sovereign instead of a shilling. Keogh on discovering his error returned in pursuit of his sovereign; but Mr. Ashwell meanwhile had generously devoted it towards the object for which he had needed the loan of a shilling, and when Keogh came back, ten shillings had been put into liquidation, and Ashwell refused to give him back the other half sovereign, saying he had only asked for a shilling. Ashwell was taken up, and tried before Mr. Justice Cave, and at the suggestion of Mr. Justice Stephen, who was his colleague on circuit, the case was reserved for the Court for Crown Cases Reserved; and Ashwell had the pleasure of being heard before fourteen Judges of England, who were equally divided on the question whether they should say that he, Ashwell, was subject to the criminal law or not, or was only subject to a common law action. One of the Judges on that case, Mr. Justice Manisty, in holding that Ashwell was not subject to conviction for larceny said:—"I may add this that the real remedy, and it is a very important part of the case—the real remedy of the prosecutor was to bring an action to recover nineteen shillings out of the twenty as money had and received for his use, and to recover back the shilling, which the prisoner undertook to repay the next day, as money lent. The prisoner had a right to take that sovereign and change it, and take a shilling out of it, and to return the nineteen shillings." It would be better to take Dogberry's advice and "thank God that you have got rid of a thief" rather than pursue an action in the form suggested by Mr. Justice Manisty.

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(1) 16 Q. B. D. 190.

The case has been twice argued before us and I am afraid that it is to my obstinacy on the first hearing that the second argument is due. I consider that the judgment of Lord Coleridge in the case of *Reg.* v. *Ashwell* (1) was perfectly right. That was the opinion I had formed on cases of this kind long before ever *Reg.* v. *Ashwell* (1), was decided, and that opinion was fully confirmed by reading the judgments delivered in that case. As I am the cause of the second argument, I am bound not to prolong it further than is necessary, and I think it is idle to add anything to the judgment of Lord Coleridge in *Reg.* v. *Ashwell* (1) and to the judgments already given here to-day. I have only to express my concurrence in those words of Lord Coleridge at the close of what I think was a very able and learned judgment, consonant with reason and common sense. He says:—"It is an intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences must be acts of the mind; and to hold the contrary—to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but very unnecessary ridicule and scorn." In that case the man thought it was a shilling; in this case the man who gave the £10 note thought that he was giving a £1 note. He intended to give, and handed to Hehir, two notes, but one of them happened to be a £10 note which he had no intention of giving to Hehir. The Lord Chief Justice said:—"I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing, and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn." I

(1) 16 Q. B. D. 190.

fully agree in that and I think that, if there was such an appropriation of the property, jewellery or money, in all or any of the cases which Mr. Justice Gibson enumerated from the days of Jacob to the present time, they would all have been thieves, and I hope subject to the criminal law in every country where intelligence and law prevailed.

JOHNSON, J. :—

Leech owed Hehir £2 8*s.* 9*d.* : to pay that debt he voluntarily handed to Hehir, who accepted and received from him, 9*s.* in silver (overpaying the pence by 3*d.*), and two bank notes which they both believed to be each of the value of £1. In fact (though unknown to them both at the time) one of these bank notes was of the value of £10. Leech and Hehir parted: and within twenty minutes Leech discovered that the note was a £10 note. He went to look for Hehir, and found that a substantial time after he received the two notes, Hehir had changed them and misappropriated £9 of the proceeds of the £10 note, instead of handing this £9 to Leech, as in honesty he ought to have done. Hehir when he received the two notes had not an *animus furandi.* On these facts, the question is, Was Hehir guilty of a larceny of the bank note which was value for £10? In my opinion, this question ought to be answered in the negative, and the conviction reversed, on the ground taken by the present Lord Justice Smith, in *The Queen* v. *Ashwell* (1), viz. that a man who honestly receives a chattel by the delivery thereof to him by its true owner, cannot be found guilty of larceny at common law, and in my opinion Hehir was not guilty of that offence. It is not necessary to quote the printed text of Glanville (C. J., temp. H. II.), or Bracton (C. J., temp. H. III.), or Fleta (ascribed to the time of Ed. I.), for the principle of law by which this case is, in my opinion, to be decided; because it is all to be found in the 3 Inst. ch. xlvii. "Of Larcenies or Theft by the Common Law," p. 107, where the ancient writers from the Mirrour to Fleta are noted in the margin, and where (as Martin, B., in *The Queen* v. *Middleton* (2), says), the "true principle is laid down by Lord Coke," viz.,

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(1) 16 Q. B. D. 190, at p. 198.

(2) L. R. 2 C. C. 38, at p. 53.

"Larceny, by the Common Law" (and this is what we are now concerned with) "is the felonious and fraudulent taking and carrying away by any man or woman, of the mere personal goods of another, neither from the person, nor by night in the house of the owner"... "First: it must be felonious, *i.e. cum animo furandi*, as hath been said, *actus non facit reum nisi mens sit rea*. And this intent to steal must be when it cometh to his hands or his possessions; for if he hath the possession of it once lawfully, though he hath *animum furandi* afterward, and carrieth it away, it is no larceny: but this receiveth some distinction as hereafter shall appear. Secondly, it must be an actual taking: for an indictment, *quod felonice abduxit equum*, is not good, because it wanteth, *cepit*. By taking, and not bailment or delivery, for that is a receipt and not a taking, and therewith agreeth Glanville: *Furtum non est ubi initium habet detentionis per dominum rei*." So at the present time a count for larceny is: of the goods and chattels of A. B. feloniously did steal, take, and carry away. Serjeant Hawkins, in his P. C., vol. 1, ch. 33, sec. 1, adopts Lord Coke's definition of larceny, and proceeds (sec. 2): "What shall be said to be a felonious and fraudulent taking? It is to be observed that all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*: from whence it follows that if a party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away." (Sec. 3.) "And from this ground it hath been holden that one who finds such goods as I have lost and converts them to his own use, *animus furandi*, is no felon." To the same effect is 1 Hale, P. C., ch. xliii., "Of larceny and its kinds," p. 504. After citing Bracton, Britton, and Coke, the form of indictment is given: "*Vi et armis felonice furatus fuit, cepit et asportavit* . . . wherein the words *felonice furatus fuit, cepit*, are essential to the crime." East, in his P. C., vol. 2, ch. xvi., sec. 1, amplifies Lord Coke's definition, and in sec. 91, sub-sect. 7, says: "The felonious intent is essential to the offence, and in order to make it felony the intent to steal ought to be at the time when the party first gets possession of the goods. Such a possession at least as is distinct from that of the owner: for a fraudulent intent originating afterwards to convert the goods to his own use is not felony;" and in sect. 113, he thus sums up the cases which he cites: "It is to be collected from them, that if a person obtain the goods of another by a lawful delivery without fraud, although he afterwards converts them to his own use, he cannot be guilty of felony." This is recognised in the latest case: *The Queen* v. *Flowers* (1) as "the old" or "the settled principle of law, that innocent receipt of a chattel coupled with its subsequent fraudulent appropriation does not amount to larceny." I am not concerned with what the criminal law of dishonesty ought to be—that is for the Legislature; the province of this Court is only to ascertain and declare what the law is. How it came to be the law is explained, I think, in sect. 4 of the chapter on Larceny, which I have referred to in Hawkins. "Our law punishes all theft with death if the thing stolen be above the value af 12*d.*, and with corporal punishment if under."

This severity of the ancient criminal law respecting larceny probably led to the establishment of the principle which I have mentioned, and though in modern times this extreme penalty has been mitigated, the same old and settled principle of law remains to-day unaffected, except in those particular cases in which the Legislature has thought it right expressly to interfere by statute. Therefore not to-day or yesterday, but more than six centuries ago, it was, and this day it is, settled law, that where there has been no trespass there can be no larceny at common law, and where the possession of a personal chattel commences with a lawful title there (apart from statute) there cannot be a felony by subsequent conversion. In the present case I fail to find in the initiatory stage "trespass" or anything which the well defined law considers equivalent to trespass. Leech was Hehir's pecuniary debtor: he intended to pay his debt with nine shillings in *specie* and two bank notes: with that intention, or in the words of the case reserved "for the purpose of paying this sum," without application by, or act or word of Hehir, Leech of his own motion voluntarily handed to Hehir the nine shillings and the two bank notes to pay his debt. Leech's intention in this act is not capable of positive or mathematical proof, but it is to be implied from his acts, and I have

(1) 16 Q. B. D. 643.

always understood the law to be, that a man is taken to intend the necessary and reasonable consequences of his own acts. If Leech did not intend to give Hehir possession of the two particular bank notes which he placed in his hand, what did he intend to give him? Admittedly, and by an "intelligent" act of his own mind, he intended to give Hehir the possession of and also the property in one of the two particular notes: what different intention (does it in any way appear) had he then and there as to the other of these two particular notes, both of which, by the same act, at the same instant of time, he gave and intended to give into Hehir's hand? In *The Queen* v. *Prince* (1) (one of the strongest cases in the books) Blackburn, J., at p. 155, says:—"As the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny." That appears to me to be sound law. In the present case the property in the £10 note did not in my opinion pass to Hehir, but that is not the question now. If Leech had known that the note in question was a £10 note and not a £1 note, probably he might not in that hypothetical case have handed it to Hehir: but the real question is, what, under the then existing conditions, was Leech's intention, not what, under some other imaginary or conjectural circumstances or conditions, might or would have been his intention. I am therefore of opinion, on the facts that Leech intended to deliver and did deliver possession of the £10 note as well as of the £1 note to Hehir, and further that in the then condition of his mind and knowledge he intended to pass the property in each of the two notes to Hehir and did not intend to make any difference either as to possession or property between them, even though the property in the £10 note did not, owing to the mistake, vest in Hehir, and that, on the old and settled principles of the law, Hehir committed no trespass, nor did any act which the law deems equivalent to trespass, when he accepted and received from Leech the note in question; and that as the case finds that when the note "came to his hands" (3 Inst. 107): "when he first got possession of it distinct from Leech" (2 East, P. C. 655) he had no *animus furandi*, consequently there was no larceny, although subsequently Hehir found out that the note was good, not only for £1, but for £10, and then retaining the £1 which was due to himself, dishonestly misappropriated the £9 residue of the proceeds of the note, which in law he had received to the use of Leech. This conclusion is supported by the cases cited in argument. In *Reg.* v. *Mucklow*, 1827) (1) a postman called at the house (where the prisoner, James Mucklow, lived with his father, about a dozen yards from St. Martin's-lane), with a letter addressed to "James Mucklow, St. Martin's-lane" where no person of that name was known. The prisoner and his father were out, and the postman left a message that there was a letter for them which they were to send for; in consequence of that message the letter was on the same day delivered to them, and the prisoner found in it a draft which he misappropriated. James Mucklow was convicted of larceny of the draft, and the conviction was held wrong on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter. The draft was not only part of the letter, but was the important chattel which the letter only covered and conveyed. That case was followed in *Reg.* v. *Davies* (2) (1856), and with these decisions agree the illustration of a person handing to a cabman a sovereign by mistake for a shilling, given in the judgment in *The Queen* v. *Middleton* (3), in which, in the judgment of seven of the Judges it is said (p. 45): "We are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he at the time he took the sovereign was aware of the mistake, and had then the guilty intent, the *animus furandi.*" In the present case the property in the £10 note did not, in my opinion (as I have stated), vest in Hehir; but applying this test, the question is was Hehir, when he took (received) the £10 note, aware of the mistake, and had he then the guilty intent? On the facts of the present case that issue must be determined in favour of the prisoner. It is erroneously stated in Stephen's Digest of the Criminal law (Note, 3rd Ed. p. 228, 5th Ed. p. 262), that the arguments in *The Queen* v. *Middleton* (3), are not reported. No counsel appeared for the prisoner, but the arguments for the Crown by Coleridge, A. G. (Metcalfe and Slade with him), are reported in 12 Cox, C. C. 262, and several cases, including *Merry* v. *Green* (1) were referred to: this case of *Merry* v. *Green* (1), and also *Cartwright* v. *Green* (2), were much pressed by Mr. Bourke for the Crown in his very clear argument. In *Cartwright* v. *Green* (2) the owner of a bureau concealed 900 guineas in *specie* in a secret drawer, and died leaving it undiscovered. Her personal representative, knowing nothing about the money, lent the bureau to his brother, who took it to India and brought it back; he knew nothing about the money; then the bureau was sold to Dick, no one all the time knowing anything about the money. Dick lent the bureau to Green (one of the defendants), a carpenter, for the sole purpose of repairing it: he and his wife and another ransacked the bureau, found the money, secreted it, and converted it to their own use, *invito domino*, without the will of the owner. It was held this was a felony, and therefore a larceny, and rightly so. First, the 900 guineas were personal chattels contained in, but independent of, the bureau, and forming no part of it. Second, the bureau and the bureau alone was delivered by Dick the owner to Green, a carpenter, in the way of his trade for the limited purpose to repair it for Dick: the *specie* was not delivered or intended to be delivered to Green for any purpose. Third, when Green first discovered the money he must then reasonably have believed as well as known that he could have found the owner either in or through Dick, the owner of the bureau who employed him to repair it, and he from the first appropriated the money to himself. The case was not unlike the old case of a carrier breaking bulk. So in *Merry* v. *Green* (1) a bureau was purchased at an auction by the plaintiff, who found in a secret drawer in it a purse and money which he then appropriated to his own use. At the time of the auction no one knew that the bureau contained anything. The solicitor of the vendor of the bureau caused the plaintiff to be arrested and brought before a magistrate on a charge of felony. The purchaser set up the defence that he bought the bureau and its contents. The charge was dismissed and this was an action for false imprisonment. There was a verdict for the plaintiff, and Parke B., in delivering the judgment of the Court ordering a new trial says: "It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass." The ground of the new trial was, that the question should be left to the jury whether the plaintiff had reason to believe he bought the contents of the bureau (if any), and consequently had a colour of right to the property. Therefore neither of these cases in my opinion in the least governs the facts of the present case or impeaches the decisions of *Reg.* v. *Mucklow* (1) or *Reg.* v. *Davies* (2), or the illustration of the cabman's case or the old principle of the law. And it may be observed that the Legislature, as mentioned in 2 Russ. 5th Ed. 413, has by the 1 Vict. c. 36, sect. 31, met (so far as the post office was concerned) such cases as *Mucklow's Case* (1). For other purposes the Legislature has left unaltered the old principle of larceny at common law.

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(1) L. R. 1 C. C. 150.

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(1) Moo. C. C. 160. (2) Dears. C. C. 640. (3) L. R. 2 C. C. 38.

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(1) 7 M. & W. 623. (2) 8 Ves. 405.

For these reasons I am of opinion, that the question submitted by the case should be answered in the negative, and the conviction reversed.

ANDREWS, J.:—

In my opinion the conviction ought to be quashed. The two separate and independent questions of the property in the £10 note and the possession of it ought to be carefully kept distinct. I regard the question of the property in the note as immaterial in this case. No doubt the property in it did not pass to the prisoner, but we have to deal with an entirely distinct thing, viz. the possession of it. Now, it appears to me manifest that, when Leech, the owner of the £10 note, handed it to the prisoner Hehir, he intended to give the prisoner the possession of the thing he handed him. If he had known it was a £10 note, doubtless he would not have given it, but, in my opinion, that only shows that

(1) 1 Moo. C. C. 160. (2) Dears. C. C. 640.

his intention arose from a mistake; it does not show that the intention did not exist. The existence of the intention cannot be got rid of by saying, however truly, that it would not have existed if he had known what at the time he did not know, that it was a £10 note. He in fact openly and visibly handed the actual note in question to the prisoner, knowing that he was handing it to him, and the prisoner in fact took it knowing that he was taking it. In neither case can the fact and knowledge which existed be annihilated by the absence of another fact, viz. the knowledge that it was a £10 note or by the mistaken belief that it was a £1 note. I am wholly unable to agree with the proposition that a man cannot take and be in lawful possession of a thing which he does not know the quality or value of, and believes to be of a different quality or value from its real quality or value. His acceptance of the possession is entirely distinct from his acceptance of the property, and may obviously exist without any acceptance whatever of the property. Nor can I at all agree that if a man takes into his possession without reservation a chattel openly handed to him, the quality and value of which he does not know, and believes to be different from what they really are, his possession can in any rational sense be said to commence only when at some subsequent time to which no limit is assigned, he becomes aware of its quality and value. In the interval the taker is knowingly in possession of the chattel in fact, and why, if he received it innocently from the owner, is not that a lawful possession? Unquestionably it is not an unlawful possession, and therefore it must come to this that, though he received it unconditionally and had retained it in his sole custody in the interval he was not in possession of it at all—a strange proposition as it seems to me, to find anywhere, but passing strange in the criminal law in which, above all, words ought not to be divorced from their natural and proper meaning, nor refinements adopted which fritter that meaning away. As regards the taking, I think with all respect it is not only an extreme refinement but an absolute fiction to say that, although the prisoner actually took the note when it was handed to him, still he did not take it until a subsequent time when he afterwards became aware that it was a £10 note, and that he then took it, when in fact he did not take it at

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all, for he had it then in his possession, having received it some time previously; such a refinement seems to me to uproot one of the fundamental and well settled principles of the common law of larceny, that an innocent taker, as, in my opinon, the prisoner was, does not commit larceny by his subsequent fraudulent appropriation of the chattel innocently taken; and by a fiction, which should have no place in the criminal law, to ignore the actual taking, and to make, in the language of Mr. Justice Talfourd, "a mere movement of the mind" amount to a taking. I think that the note in question was both given to the prisoner and taken by him intelligently—in the only sense in which that word is material to the question before us, which does not in my opinion at all necessarily include a knowledge of the actual quality or value of the thing which was in fact given—and that at the time the prisoner received the note from the owner of it he got lawful possession of it innocently, in the largest sense of the word and without anything in the remotest degree resembling a trespass. What I have ventured to describe as a refinement and fiction gives to the word *take* not only a meaning which in my opinion it does not bear in larceny, but also a strained and unnatural meaning which the word as commonly used and understood never conveys. I think the use of the word *take* in this unreal sense is largely due to what I regard as the erroneous assumption that one man cannot intelligently give to another, and the other intelligently take, the lawful *possession* of a thing of which neither of them knows the quality or value, and which, if the giver had known the quality or value of it, he would not have given; and I believe that some unconscious blending of the two distinct and independent questions of *possession* and *property* has tended to facilitate the acceptance of what I venture to think a fallacy.

I am therefore of opinion that the prisoner, who at the time he received the £10 note took it innocently, by the voluntary act of the owner — not feloniously and without the consent of the owner—was, upon settled principle, not guilty of larceny at common law, by his subsequent fraudulent appropriation of it. It was not contended that he was guilty of larceny as a bailee, under the 3rd sect. of 24 & 25 Vict. c. 96, and it is plain he was not, for there was no bailment, which mere delivery does not create; and in the similar case of *The Queen* v. *Ashwell* (1) it was held that the accused was not guity of larceny as a bailee.

I shall not occupy time by repeating the distinctions which have been so fully pointed out between the present case and cases of finding, and breaking bulk, and cases in which the very existence, as distinguished from the quality or value of the chattel, was unknown to both parties when it came into the possession of the person who, upon discovering it, fraudulently appropriated it; nor by commenting on the numerous authorities and cases to which we have been referred; because I feel that I could not usefully add anything to what has been already said on these matters by the learned Judges in their judgments in the case of *The Queen* v. *Ashwell* (1). I may observe that I do not think the conviction in that case was affirmed. I think it merely stood because it was not quashed. In my opinion the present case is not governed by any of the other classes of cases to which I have alluded; and I have only to add that if, as I will assume, such dishonesty as the prisoner was unquestionably guilty of ought to be larceny, which fraudulent conversion by a bailee without breaking bulk was not, until so made by statute, it is in my opinion for the Legislature to make it larceny. Every fraud is not a crime; and the Judges have no authority to create a fraud, no matter how grave, a new criminal offence. We have only to determine whether the prisoner was guilty of larceny as the law at present stands, and, in my opinion which I confess I entertain without any doubt, he was not.

O'Brien, J.:—

Looking in this case through the wilderness of decisions, of subtleties and points, not to add to arguments with which the case is overladen, but to estimate the force of those already used—in order to come to solid grounds for my own conclusion, and try and see where the real conflict or stress of the question lies—I consider, in the result, that the question of consent in the owner's mind (which of course did not exist as to the sum of £10), the quality of the possession, and whether or not it was a legal possession (the term so frequently used in recognition of the necessity that there might be a possession which was not legal), the incidents of that possession, or the legal relations arising out of it, or the point that it arose out of a contract as defining a possession which was contrary to it—these are all absolutely outside the true principle of the matter, which is, that the owner, by his own act, put into the control of the party charged, innocently on his part at the time, the specific subject which was in fact afterwards the means of committing the alleged crime. Can anyone say, applying common intelligible meaning to words, that that state of facts is consistent with the definition of larceny, as established in the earliest foundations of the law—which is that the party feloniously took and carried away—a definition coming down, through Bracton, Glanville, Fleta, Coke, from the most remote origin of our legal system, followed by all the text writers, and identical with the language of the indictment at this day. The old law French which Lord Coke quotes from the *Mirrour*, is most explicit and distinct in stating the constituents of the crime of larceny in terms which can by no means possibly be understood of taking and carrying away otherwise than in their ordinary sense. Was it a metaphysical idea that was in the mind of those ancient founders of the law? Or are we to add a new crime to the calendar, by refinement? The nature of the criminal law is that it is conversant with acts. People are not punished for temptations. Whose was the act in this case? There was no act but that of the owner. For, according to the argument, the prisoner would have been guilty of larceny if he had simply retained the £10 note, after he knew what it was. For the purpose of this view, the period of time, during which he was in possession of the note without knowing the amount, must be blotted out altogether—not in law merely, but even in physical existence. In fact it must be considered the same as mere vacancy, and yet, by some curious legal fiction, the offence of the accused is carried back over that vacancy to the time of the first transaction, to satisfy the words of the indictment that he "feloniously took," when it is certain he did not take. Thus a crime committed to-day is projected forward a month hence, or even it may be a year, to the time when the person conceives the idea of appropriating the article. By the same kind of fiction, the trespass, which according to the authorities must exist in the crime, is wholly got rid of—not because the prisoner was innocently possessed until the dishonest intention arose—but because there was no possession. And thus a possession, which did not exist at all when he was innocent, came into existence when he had a guilty mind, so as, without any act but of the mind, to make out that he feloniously took. The prisoner is not a person who obtains something wrongfully by *latrocinium*, by the direct and conscious invasion, open or secret, of another's right. He is not a bailee. He is not a finder. We must invent a new category. He is a finder out. In other words, he commits a crime by the operation of the mind. But we have still further to go in order to fulfil the definition of larceny. What becomes of the *asportavit*—the other element in the crime? When does the person carry away? Are the taking and carrying away distinct things in this new theory of larceny? Or are they both comprised in what may be a purely mental act—the appropriation? I fear it must be answered that the *asportavit* disappears altogether—that there is no room for it and the *cepit* in the same thought and in the same instant. It may be thought that these are almost ridiculous refinements, but they become so by reason of the refinements they are intended to meet; for we are engaged in pursuing a phantom—an impalpable subtlety that eludes comprehension, and makes thoughts and fictions and relations the rule of conduct as to crime. The law, above all the criminal law, that takes from a man the natural dominion over himself, and delivers him over as a slave to another power for punishment, was made to be understood as well as to be obeyed.

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(1) 16 Q. B. D. 190.

I have heard it suggested that we ought to construe the law under the influence of a desire to punish what is of course gross dishonesty and wrong. That strikes me as a novel proposition. I have always understood the direct opposite to be accepted as the rule of judicial action, and the expression occurs somewhere that the law abhors making crime by mere constructions and refinements. And I oppose to such a view, as the more correct exposition of the law, the statement of the rule by Lord Bramwell, which occurred to him as specially applicable to this particular question, in the case of *Reg.* v. *Middleton* (1) "It is a good rule," he says, "in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law, and to trust as much as can be to the operation of the civil law for the prevention and remedy of wrongs." And he repudiates the reasoning of his opponents in this simple manner: "The prisoner was as bad as a thief (which I deny), and being so bad ought to be treated as one (which I deny also)." Lord Bramwell makes some further observations, which are not deprived of their application to this case by the fact that they were not acted on under the different circumstances of *Reg.* v. *Middleton* (1):—"It is also a good rule not to make that a crime which is the act or partly the act of the party complaining—*volenti non fit injuria;* as far as he is willing, let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English common law. Obtaining goods by false pretences was no offence át common law. Ordinary cheating was not. Embezzlement, &c., by servants was not larcenous. Breaches of trust by trustees and bailees were not." And, having alluded to the case which is no longer an example after the decision in *Reg.* v. *Dee* (2), he says: "And most particularly was and is this the case in larceny, for the definition of it is, that the taking must be *invito domino.*" Now, of course it is impossible to admit of any confusion of ideas as to what is the meaning of *volens* and *invitus*; of course the owner was not *volens* as to a sum of £10. But the corporeal transfer of what was the symbol of a different value from what the prosecutor thought, cannot be left out, in my opinion, from the idea of larceny, in which the change of the possession is inherent. The question, for this purpose, is not what was in the mind of the prosecutor, but what he caused the prisoner to suppose was his act. The prisoner could have been indicted for stealing the piece of paper, whatever the value was. The chapter of the 3rd Institute embraces all the leading propositions in the law of larceny, and there is not a single word used by Lord Coke, or any of the authors whom he quotes, or in

(1) L. R. 2 C. C. 160. (2) 14 L. R. Ir. 468.

any of the text writers since, consistent with any idea but that of the physical taking of the goods. But Mr. Fitz Gibbon pressed the Crown with the embarrassing question, which appears to baffle all solution, as to what is the position of the accused, in the interval between receiving the article and finding out the mistake. Trover could be brought against him, because the property in the £10 was not intended to pass. Perhaps an action for money had and received would lie. But could trespass lie against him? Certainly not. Trespass, however, is the test of possession. Where it would lie there must be possession. Now all the authors on criminal law lay down that trespass is an ingredient or accompaniment of larceny. And a case is reported in Kelynge, where it was held that a party was not guilty of larceny, but was of trespass. In order, therefore, to meet this objection, and to give a reason why trespass, which implies possession, would not lie, though larceny is alleged, and to avoid the anomaly of a person being innocent at first, and afterwards guilty—of the transfusion, without any necessary new act, of innocence into crime—we have to adopt the expedient of taking the criminal act as of the time when he found out the mistake, and of extinguishing the original transaction altogether, as if it never existed—with the logical result of a thing continuing that had no beginning. In the case of an innocent finder, the law excludes guilt afterwards. But, in the case of the innocent receiver, we are required to assume guilt. Yet the interval of innocence in the receipt in one case, corresponds exactly to the innocence of the finding in the other. The person who obtains the possession by the act of the owner cannot be in a worse position than if he obtains it by the owner's involuntary loss of the possession.

Several other tests are capable of being put of the legal position of the accused—tests that draw the line between the civil remedy and criminal liability—such as that put by Mr. Justice Mathew in *The Queen* v. *Ashwell* (1), whose judgment more nearly than any other expresses my view on the whole case. Suppose the prisoner, after changing the note, had kept part of it, and brought back the rest to the owner, would he be still guilty of larceny? If we turn from principle to authority I would have been of the opinion that the question was certainly determined by the cases that preceded *The Queen* v. *Ashwell* (1); particularly *The Queen* v. *Mucklow* (2); *The Queen* v. *Davies* (3), and *The Queen* v. *Middleton* (4), which, it was admitted by Cave, J., one of the Judges who held the conviction good in *The Queen* v. *Ashwell* (1) could not be reconciled with *Cartwright* v. *Green* (5) and *Merry* v. *Green* (6), on which, however, he based his judgment. Yet it appears most extraordinary that the obvious distinction that lay upon the surface of the latter cases did not occur to him—that the prisoner did not in the first instance receive, and the owner did not deliver to him at all, the visible external thing, which was the subject of the larceny charged. Possession in no sense could be said to have been given of what was concealed in a bureau. There is a difference certainly in *The Queen* v. *Mucklow* (2), that it was the case of the delivery to the wrong man and not of the wrong amount. But the difference is a difference in the instance and not in a point that affects the principle. The owner in each case of his own accord transferred the actual article. He would not have transferred it if he had not made a mistake. The other party knew nothing, alike of the error in the person or the error in the thing. The nature of the mistake under which the transferor acted did not affect the quality of the act as it was understood by the transferee. But in *The Queen* v. *Middleton* (4) the majority of the Judges who upheld the conviction laid down that the conviction would be wrong in a case absolutely undistinguishable from the case we have to deal with. I do not consider that these cases are levelled or deprived of their authority by having been submitted to the Court in *The Queen* v. *Ashwell* (1), and resulted in a divided judgment; for the equal division of opinion no more determined the value of the authorities cited than it did the case itself. We have, moreover, since *The Queen* v. *Ashwell* (1), the construction put upon the judgments by Lord Coleridge and two other of the Judges who were in favour of the conviction, in the case of *The Queen* v. *Flowers* (1), in which the finding of the jury brought the facts exactly to those of *The Queen* v. *Mucklow* (2). Even if the result of *The Queen* v. *Flowers* (1) could be explained, which I do not see it can, by the supposed mistake of the Recorder in his charge, from which no error could have found its way into the finding of the special facts, the desire of the Judges to correct the alleged mistake of their views in *The Queen* v. *Ashwell* (3), without drawing any distinction to show in what respect it was mistaken, and their pointed and emphatic assertion of the rule of the common law as unchanged—that a person innocently receiving a chattel and afterwards fraudulently appropriating it was not guilty of the crime of larceny—not adverting to any qualification of that rule on which their judgment was based—most clearly satisfy my mind as to what will happen if this precise question comes to be again submitted to an English Court. Accordingly I follow those of my colleagues who hold that no crime has been committed, in the direction in which reason and authority—to leave out prophecy—appear to me unerringly to lead. Whether the act in question—which certainly up to the present was not considered to be a crime, frequently as it happened, and which the prosecutor himself gave the opportunity of committing—ought to be made criminal, is a matter that may or may not exclude difference of opinion. Suffice it to say, that for the present it remains in that category of moral transgression, as to which the law has not hitherto given effect to the views of such as think to compass the sea by undertaking the impossible task of trying to push out the confines of crime into the boundless region of dishonesty. In my opinion the conviction ought to be reversed.

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(1) 16 Q. B. D. 190.

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(1) 16 Q. B. D. 190.
(2) 1 Moo. C. C. 160.
(3) Dears. C. C. 640.
(4) L. R. 2 C. C. 38.
(5) 8 Ves. 405.
(6) 7 M. & W. 623.

Palles, C. B. :—

I also am of opinion that the conviction should be quashed; and I have arrived at that conclusion for the reasons stated by Lord Justice Smith and Mr. Justice Mathew in *The Queen* v. *Ashwell* (3), and by Mr. Justice Andrews in the present case, all of which judgments I adopt as my own. I should not have said more, were it not for the refined metaphysical or psychological

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(1) 16 Q. B. D. 643. (2) 1 Moo. C C. 160. (3) 16 Q. B. D. 190.

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doctrine which the late Lord Chief Justice of England, in a judgment concurred in by three of his learned colleagues and approved by four members of this Court, thought applicable to a case like the present. For this reason I desire to state my objection to the conviction as clearly as I can, in my own words. That objection is that, a judgment sustaining it, will create, by subtle and highly technical reasoning, a new criminal offence, which was unknown to the common law, and contrary to express precedent, covering upwards of half a century. I admit that the act of the prisoner was a dishonest one; but I hold that if it be thought right that such an act should be made punishable, the function of doing so is that of the Legislature, and not of the Judges.

There are three decisions, two of them pronounced by the Court for Crown Cases Reserved in England, which are distinctly against the present conviction, viz. *Rex* v. *Mucklow* (1) decided in 1827; *Reg.* v. *Davies* (2) decided in 1856; and *Reg* v. *Middleton* (3) decided in 1868. All the Judges who, in *Reg.* v. *Ashwell* (4) were in favour of the conviction, admitted that its affirmance involved the overruling of the two first of these cases; and—although the judgment of Lord Coleridge as reported (p. 225) treats one of the passages cited from the judgment in *Reg.* v. *Middleton* (3) as an authority in favour of the conviction—it is plain that either he must have been erroneously reported or he must have been himself in error. The terms of the quotation are too plain to be so interpreted, or to be explained away. The passage is taken from the judgment of Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., and is in the following words:—"We admit that the case is indistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling. But, after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, *at the time he took the sovereign*, was aware of the mistake, and had then the guilty intent, the *animus furandi*."

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(1) 1 Moo. C. C. 160.

(2) Dears. C. C. 640.

(3) L. R. 2 C. C. 38.

(4) 16 Q. B. D. 190.

Were this passage no more than a mere *dictum*, unnecessary to the decision of the case, as it has been treated by the counsel for the Crown here, it would, by reason of the number and position of the Judges who expressed it, be of the very highest authority. But I venture to think that it is more than this. It appears to me to involve the very *ratio decidendi* upon which, in that case, the conviction was sustained. There were two questions there:—(1), whether the property in the sovereign passed to the prisoner: (2), the wholly independent question—equally important upon the matter involved—if not, did its possession, as distinct from the property therein, pass? The decision involved the affirmance of two distinct propositions of law, each material to the decision; 1, that the property did not pass; but 2, that the possession did pass; because it is admitted that it is upon this assumption only that the question whether the acceptance of the coin by the cabman could depend upon the existence of the *animus furandi at the time he took the coin.* To this I must add that Kelly, C. B., and Pigott, B., proceeded upon the same principle; and that Lord Bramwell, Lord Esher, and Barons Martin and Cleasby dissented, and were of opinion that even that decision carried the law too far.

Thus it would appear that the opinion of each of those Judges was adverse to a conviction in a case such as the present.

I have, however, particularly to point out that the case is a distinct authority that a mistake in the subject-matter of a gift or bailment, sufficient to prevent the passing of the property in the subject-matter, does not necessarily prevent the possession passing where there has been a manual delivery. I pointedly call attention at this stage to this matter, to which I shall have occasion hereafter to refer, as it not only renders *Reg.* v. *Middleton* (1) a distinct authority in favour of the prisoner in the present case, but it accentuates a distinction which, with great deference, I cannot help thinking was overlooked by such of the Judges as were in favour of the conviction in *Reg.* v. *Ashwell* (2), and to which sufficient attention has hardly been given in the present case.

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(1) L. R. 2 C. C. 38. (2) 16 Q. B. D. 190.

I cannot find that in any criminal case, prior to 1885, anything contrary to the above three decisions was laid down, and thus for fifty-eight years before the decision in *Reg.* v. *Ashwell* (1) there was an unbroken series of decisions that an act similar to that of the prisoner here was not larceny. In *Reg.* v. *Ashwell* (1) the Judges were equally divided, and therefore the affirmance of the conviction was merely by force of a technical rule.

So much as to the authorities against the present conviction. I have now come to those which have been relied on to support it. The Judges who affirmed the conviction in *Reg.* v. *Ashwell* (1) did so upon the authority of two cases only, and those cases which involved civil liability only; viz. *Cartwright* v. *Green* (2) and *Merry* v. *Green* (3). These cases they thought incapable of being reconciled with the three decisions in the criminal Courts which I have mentioned; and conceiving themselves bound to choose between two lines of conflicting authorities, they adopted that line which was adverse to the view of the criminal law which had for so long prevailed, and had been more than once supported by the very Court in which they were then sitting. Now, bearing in mind the importance of the criminal law—especially that part of it which is within the jurisdiction of magistrates—being certain, and its administration being uniform, I should have thought that even had *Cartwright* v. *Green* (2) and *Merry* v. *Green* (3) been inconsistent with the criminal cases, the latter should have been followed in a criminal Court, at least unless the matter were put upon the record by way of special verdict, so that the decision might be capable of being reviewed by the House of Lords. It is to be remarked that neither *Cartwright* v. *Green* (2) or *Merry* v. *Green* (3) was decided by a Court equal in authority to that of the Court for Crown Cases Reserved; that one of them had been decided long prior to any of the criminal decisions, and that the second was prior to either *Davies*' (4) or *Middleton's Case* (5).

Further, I have to state that, in my opinion, there is no

(1) 16 Q. B. D. 190.
(2) 8 Ves. 405.
(3) 7 M. & W. 623.
(4) Dears. C. C. 640.
(5) L. R. 2 C. C. 38.

inconsistency between the two lines of cases. In both *Cartwright* v. *Green* (1) and *Merry* v. *Green* (2) both bailor and bailee were ignorant of the *existence* of the guineas in the one case and of the purse and money in the other, and in neither case was there any actual handing over of the property in question. Now admitting that, to pass the possession of a chattel, there must, as a general rule, subject to some exceptions, be knowledge of the existence of that chattel in both the giver and the receiver, there was that knowledge in the present case. The conviction here must therefore, if sustainable, rest upon this point—that a mistake in the mind of the donor, of a particular quality in a chattel, of the existence of which chattel the giver has knowledge, and which chattel is physically handed over to another, is as regards the possession of that chattel the same, as if the donor were ignorant of its existence. Now, this was the proposition as to which the Judges in *Reg.* v. *Ashwell* (3) were equally divided, and for this neither *Cartwright* v. *Green* (1) nor *Merry* v. *Green* (2) was an authority. The actual decision therefore, in *Reg.* v. *Ashwell* (3), whilst it overruled three cases, has not the advantage of a single prior authority to support it, and whether right or wrong, was one of first impression. Let me now see the ground upon which it was arrived at. It is most clearly put in the judgment of Lord Coleridge, in which Grove, J., Pollock, B., and Martin, B., concur; one of those Judges having been a party to the judgment in *Reg.* v. *Middleton* (4), from which I quoted the passage mentioned in the earlier part of my judgment:—

"But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law, any more than in sense, a delivery and receipt unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, that the law speaks of; not a mere physical act from which intelligence, and even consciousness, are absent. I hope it is not laying down anything too broad or loose, if I say, that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary—to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing, and did not intend to do,—to hold this is to expose the law to very just, but wholly unnecessary, ridicule and scorn." Later on he adds: "I think we cannot reverse the conviction without practically overruling the *dicta* cited by my brother Cave, from the judgment of the majority of the Judges in *Reg.* v. *Middleton* (1)."

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(1) 8 Ves. 405.
(2) 7 M. & W. 623.
(3) 16 Q. B. D. 190.
(4) L. R. 2 C. C. 38.

I agree that it is of intelligent delivery that the law speaks, not of a mere physical act from which intelligence and consciousness are absent; but I venture to think that the subsequent words of the Lord Chief Justice are extremely loose and too general. If he intended to convey that because a man mistook the value of a coin which he knowingly handed over under a mistake as to its value, intending that the coin should cease to be in his possession, and that it should be in the possession of another, he did not in law part with the possession of that coin; he assumed, without argument, the question to be decided, and overlooked the distinction, so pointedly taken in *Middleton's Case* (1), between passing the property and passing the possession, and by so doing overrules, as I think unconsciously, that case, and also those of *Mucklow* (2) and *Davies* (3). I say unconsciously, because I cannot believe that the inconsistency of his judgment with those cases could have been present to his mind in the face of his words: "If it had been so decided by authority which binds me, of course I should submit, but *if it has not been so decided*, I take the freedom to say that it is not law." Surely there is an end to all certainty in the criminal law, if the Court for Crown Cases Reserved is not bound by its own decisions, save only in cases where those decisions are contrary to previous decisions of the same Court.

But this judgment does not stop there. Later on the Chief Justice says: "I think I cannot reverse this conviction without practically overruling the *dicta* cited by my brother Cave from the judgment of the majority of the Judges in *Reg.* v. *Middleton* (1)." And again, "The passage from the judgment of Sir A. Cockburn, which was assented to by the majority of the Judges in *Reg.* v.

(1) L. R. 2 C. C. 38. (2) 1 Moo. C. C. 160. (3) Dears. C. C. 640.

Middleton (1), appears to me, as it does to my brother Cave, to be decisive of this case."

Surely these passages demonstrate that there must have been some grave misapprehension in the mind of the Lord Chief Justice. The passage he refers to as having been cited by Mr. Justice Cave from the judgment of Sir A. Cockburn, and assented to by the majority of the Judges in *Reg.* v. *Middleton* (1), is that which I have already read, and is one which was no doubt decisive of the case, but decisive that the judgment ought to have been one of acquittal, and not of conviction.

For argument sake, however, I shall assume for a moment that the matter is not concluded by the authorities I have referred to, and I shall therefore proceed to consider the matter upon principle. The matter is one which is to be decided from the standpoint of our law, not according to the views of any particular school of philosophy. I apprehend that according to our law, as one's mental act, such as consent or intention, can be known to another only by his external act, it follows that where the actually existing intention, by mistake, differs from the intention expressed by the external act which signifies it, the expressed intention must, in relation to the act of another, honestly induced by such expressed intention, be deemed to be the real intention.

This matter may be tested by cases of written contracts, in which the only intention which the law recognises is that expressed in the writing. In such a case, if there be a material mistake as to the subject matter of the contract, the law does not say that, by reason of that mistake, the signing of that contract is reduced from an intelligent act to something from which intelligence and consciousness are absent, or that that act of signing did not carry legal consequences because the party signing, did not, in a sense, know the exact thing he was doing, and did not intend to do that very thing. In such a case the remedy, if any, would be in equity on the ground of mistake.

It is true that this result ensues, because of the rule of law that the intention must be gathered from the writing, and therefore the law gives effect to an intention different from that which, speaking philosophically, exists as the mental act of the party. Why, however, should not the same effect be given to the rule of law which lays down that a man must be held to intend to do that which is the necessary consequence of his own act? In the present case Leech, believing a note to be for £1, handed it to the prisoner, by an act equivalent to a statement: "I give you this note; take and hold possession of it as your own." The prisoner accepted it honestly, believing that Leech intended him to take and hold possession of it.

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(1) L. R. 2 C. C. 38.

If Leech had in fact the intention expressed by his act, the prisoner would have had lawful possession of the note; and I hold that so long as the prisoner believed the note to be for £1, the prosecutor cannot be heard to say that he had not that intention; and if he cannot, neither can he say that in the interval between the note being put into the hand of the prisoner, and the discovery by the latter of the mistake, the prisoner had not its lawful possession. Thus even if on the discovery of the mistake he was bound to return the note unconditionally, the conviction would be wrong. But further, what was the effect in the present case of the discovery of the mistake? I say nothing as to what it would have been had this been an indivisible chattel, such as a horse or a statue. The note here was given and received as currency; and I cannot see any difference between the case here and that of a mistake in counting notes, and of a person receiving nine more £1 notes than he or the giver intended. It is quite plain that in the latter case the obligation of the receiver would have been to return nine only of the notes, and I cannot believe that there was any greater obligation upon the prisoner in the present case. For instance, had he offered to return the £10 note upon payment to him of £1, and had Leech refused him that £1, I believe that he might lawfully have retained the £10, at least until he had a reasonable opportunity of changing it, and I further hold that if, under those circumstances, he had changed the note and tendered £9 to Leech, he would have been under no liability, civil or criminal. But if this is so, he must have had the lawful possession antecedent to the discovery of the mistake; and whatever effect discovery may have upon his future acts, it cannot, as it appears to me, change the character of his antecedent possession, and, by relation back, render that antecedent possession, which at one time was his, the possession of Leech.

Upon the whole, I am of opinion that the prisoner acquired the lawful possession of the note when it was handed to him, and that his subsequent dishonest appropriation of it did not amount to larceny at common law. It has not been argued that it is larceny by statute, and I am therefore of opinion that the conviction should be quashed.

SIR P. O'BRIEN, L.C.J. :—

I regret that I cannot concur in the judgments of those members of the Court who are of opinion that the conviction should be affirmed. The accused was manifestly guilty of very palpable dishonesty, but he is not, in my opinion, amenable to the law in its unreformed condition. I say "unreformed condition," for in my opinion it requires reformation, so as to reach the moral fraud of which the man Hehir was plainly guilty. The most recent statement of the rule of law applicable to the case is to be found in *The Queen* v. *Flowers* (1), viz. that the innocent receipt of a chattel and its subsequent fraudulent appropriation does not constitute larceny. It is said that, though the accused in this case got the note into his hand under circumstances where *ex concessis* the relation of master and servant was not intended to be created—that though he got it into his hand—though he got the chattel, the £10 note, into his hand—he did not *receive* it. I cannot accept this contention. This is not, as I have said, a case where, at the time of handing over the note, the owner intended to create between himself and the person to whom he gave the note, the relation of master and servant. Here Leech—intending to part with the possession of it—gave the chattel to Hehir, and in my judgment Hehir, to whom he gave it, in the eye of the law as well as in the eye of commonsense, received it. The one gave unreservedly; the other honestly received unconditionally. True, the giver gave under a mistake as to its value, believing it to be a £1 note, whereas in fact it was a £10 note. No doubt he would not

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(1) 16 Q. B. D. 643.

Sir P. O'Brien, L.C.J.

have given the particular chattel if he knew it was a £10 note; but the very fact of his mistaken belief that it was only a £1 note, made him give the note without any condition or reservation whatever. He manually transferred the chattel, to use the language of Lord Bramwell in *The Queen* v. *Middleton* (1), " not involuntarily, not accidentally, but on purpose." (See his judgment at page 55 of the report.)

The case before us is admitted to be identical in principle with the case of *The Queen* v. *Mucklow* (2) where it was held that a charge of larceny could not be maintained. If an acquittal should have been directed in that case, *a fortiori* it should be directed in this; I quite agree with what Mr. Justice Stephen says about *The Queen* v. *Mucklow* (2) and *The Queen* v. *Davies* (3). In these cases it was not intended that the prisoner should receive anything, whereas in the case before us the owner of the note manually delivered it to the prisoner. But it is said that *The Queen* v. *Mucklow* (2) was a decision without argument at the bar—that it was the result of a moot amongst the Judges. We must remember, however, that no inconsiderable portion of our criminal law is founded upon judgments arrived at in a similar manner; and that, notwithstanding its being arrived at without argument at the bar, the eminent Judges who decided *The Queen* v. *Davies* (3) recognised its authority and followed it, and considered themselves justified in doing so, notwithstanding the opinion of Chief Justice Erle who presided at the trial of *The Queen* v. *Davies* (3). Mr. Justice Holroyd, a very eminent Judge, who heard, at the trial of *The Queen* v. *Mucklow* (2), a full discussion of the cases on the subject, concurred in the judgment in that case. All the Judges were apparently present, and were unanimous in their opinion that the conviction could not be affirmed. But it is said that *The Queen* v. *Mucklow* (2) and *The Queen* v. *Davies* (3) are inconsistent with the cases of *Cartwright* v. *Green* (4) and *Merry* v. *Green* (5). I do not think so; I think that they are distinguishable on the grounds so clearly put by Mr. Justice Smith, in his judgment in *Ashwell's Case* (6). It is not necessary to repeat, with

(1) L. R. 2 C. C. 38.
(2) 1 Moo. C. C. 160.
(3) Dears. C. C. 640.
(4) 8 Ves. 405.
(5) 7 M. & W. 623.
(6) 16 Q. B. D. 190.

reference to this point, what that learned Judge said in his very able judgment in *The Queen* v. *Ashwell* (1), or what my colleagues who agree with me in this case have stated here. I find besides—not at all an unimportant matter—that the 7 Wm. 4, & 1 Vict. c. 36, s. 31, which makes it a crime in one person fraudulently to detain a letter which ought to have been delivered to another person, was introduced to meet such cases as *The Queen* v. *Mucklow* (2) and *The Queen* v. *Davies* (3). It is stated in page 421 of the 19th edition of Archbold, the edition of 1878, that this new provision was intended to meet the case of *The Queen* v. *Mucklow* (2) and *The Queen* v. *Davies* (3). This in my opinion is a statutable recognition of the law as laid down in these cases. I come now to the remarkable case of *The Queen* v. *Middleton* (4), the true bearing of which was, in my opinion—and I say so with much humility—entirely overlooked by Lord Coleridge, and the Judges who agreed with him, in *The Queen* v. *Ashwell* (1). I assume that the decision of the majority of the Court in that case, which was adverse to the accused, was right, though in my opinion it appears open to great doubt; and the learned editors of Russell on Crimes, at page 151 of the 2nd volume, submit that it was wrong. But what was the ground of the decision? It is expressed in four lines of the judgment as follows:—"In the present case, the finding of the jury that the prisoner at the moment of taking the money had the *animus furandi*, and was aware of the mistake, puts an end to all objections arising from the fact that the clerk meant to part with the possession of the money." This clearly proceeds on the basis, that though there was a mistake as regards the person, the prisoner would not be guilty unless he had the *animus furandi* at the moment he got the money. In the case before us it is admitted that the prisoner had not the *animus furandi* when he got the note into his hand; but the identical case is put by the majority of the Judges in the judgment. They say, "We admit that the case is indistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling, but *after carefully weighing* the opinions

(1) 16 Q. B. D. 190.
(2) 1 Moo. C. C. 160.
(3) Dears. C. C. 640.
(4) L R. 2 C. C. 38.

to the contrary we are *decidedly* of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he at the time he took the sovereign was aware of the mistake and had then the guilty intent, the *animus furandi.*" It is absolutely plain, as pointed out by Mr. FitzGibbon, in an argument distinguished by an hereditary ability, that in this passage the words "at the time he took" mean at the time he got the sovereign into his hand. This is the very case before us, and this is the well-considered opinion of seven distinguished Judges, including Chief Justice Cockburn and Lord Blackburn. The opinion was delivered apparently with great care, and they pronounced it after, to use their own expression, "carefully weighing the opinions to the contrary," and it was no mere *obiter dictum*, for it shows the distinctive difference between the case put by way of illustration, and the case before them, which consisted in the fact of the existence of the felonious intent at the crucial moment of getting physical possession. It proceeds also on the basis that though the property would not pass, the possession would be taken at the moment the sovereign was received by the cabman, and that guilt or innocence would depend upon the existence of the *animus furandi* at that moment. In my judgment, whether we regard the opinion of the majority of the Judges in *The Queen* v. *Middleton* (1) as to the supposed case of a cabman, or their *ratio decidendi* of the case itself, their decision is plainly antagonistic to the view of Lord Coleridge in *The Queen* v. *Ashwell* (2). A case much relied on by that very distinguished Judge was the case of *The Queen* v. *Riley* (3), but I own I do not see its application, or rather I should say its force, in the direction to which Lord Coleridge sought to make it bear. That case had reference to the felony of a sheep, but the owner of the sheep did not consent to its being in the physical possession of the prisoner. The physical material thing, the sheep, was taken by the prisoner, *invito domino*, and the case was dealt with by all the Judges as one of trespass *ab initio.* "The taking being a trespass," said Baron Parke, "when there is *animus furandi* it becomes a felony."

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(1) L. R. 2 C. C. 38. (2) 16 Q. B. D. 190. (3) Dears. C. C. 149.

The true bearing of the case, in my opinion, points to a conclusion, the opposite of that which Lord Coleridge thought it supported. The same distinguished Judge is reported to have said in *The Queen* v. *Ashwell* (1) as follows :—" The passage in the judgment of Sir A. Cockburn which was assented to by the majority of the Judges in *The Queen* v. *Middleton* (2) appears to me, as it does to my brother Cave, to be decisive of this case." It is quite plain that this statement, if indeed it is rightly reported, which I much doubt, proceeded upon an entire misapprehension, not only of the opinion of the majority of the judges in *The Queen* v. *Middleton* (2), as expressed in the passage to which I have referred, but of what Mr. Justice Cave said in reference to that passage in *The Queen* v. *Ashwell* (1). The latter Judge, classing it with *The Queen* v. *Mucklow* (3) and *The Queen* v. *Davies* (4), admitted that it was in point and in favour of the prisoner, but said he could not reconcile it with the cases of *Cartwright* v. *Green* (5) and *Merry* v. *Green* (6). The judgments of Mr. Justice Smith, Mr. Justice Mathew, and Mr. Justice Manisty in *The Queen* v. *Ashwell* (1) seem to me to be conclusive of the case before us. Some of the passages in Mr. Justice Stephen's judgment are perhaps a little loosely expressed, but the judgments of the three very learned Judges, to whom I have referred, seem to me to be conclusive. With great deference to the high authority of Lord Coleridge, I cannot accept his judgment in *The Queen* v. *Ashwell* (1). It certainly in result asserts the claims of moral justice, but in my opinion it has no legal sanction. However much we may dislike the law, we must administer it as we find it, and though we may think it requires alteration, we cannot invade the province of the Legislature. I am accordingly of opinion that the conviction should be quashed.

Solicitor for the Crown : *H. T. Wright.*
Solicitor for the prisoner : *Michael Dalton.*

J. H. P.

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(1) 16 Q. B. D. 190.
(2) L. R. 2 C. C. 38.
(3) 1 Moo. C. C. 160.
(4) Dears. C. C. 640.
(5) 8 Ves. 405.
(6) 7 M. & W. 623.

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CARRIERS—*continued.*
Company, whether published or not; and the reasonableness of such arrangements (which is a matter for the Railway Commission) cannot be submitted to a jury. Where a Railway Company publishes no time-tables of goods traffic arrangements, the *onus* of inquiry lies upon the consignor, and where a consignor has delivered goods to a Railway Company for carriage under an open contract, representations made, subsequent to the making of the contract, by a servant of the Railway Company not proved to have authority to make such representations, are inadmissible in evidence to modify the contract. *Tobin* v. *London and North Western Railway Company* - Q. B. 22

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2. —— *Severance of portion of the demesne—Land Law Act*, 1881—*Demesne land—User as agricultural land for over fifty years.*] By lease, dated the 14th November, 1788, *W. D.* demised to *H. S.* "the house, offices, and demesne of *P.*, with the farm and lands of *G.*," containing 156a. 2r. Irish plantation measure, for three lives, with a covenant for perpetual renewal. This lease was renewed, and the lessee's interest became vested in *C.*, the tenant. By sub-lease, dated the 21st November, 1794, portion of these lands were demised by *H. S.* (the lessee) to *W. D.* (the lessor), described as "The farm and lands of *C.*, and part of *G.*, otherwise *P.*, and now called Fairy Hill," containing 83 acres, for three lives, with a covenant for perpetual renewal, at the rent of £100 5*s.* This lease was renewed, and subsequently became vested in *C.*, the tenant. By sub-lease, dated the 6th May, 1805, portion of these lands were demised by *W. D.* to *H. D.*, for three lives, with a covenant for perpetual renewal, at the rent of £26 1*s.*, and this portion of the lands were described as "That part of the demesne of Fairy Hill, . . . bounded on one side by the high road leading from *P.* to *E.*, on another side by the road or avenue from the said high road to the house of Fairy Hill, on another side by the said demesne of

DEMESNE LANDS—*continued.*

Fairy Hill," containing 19a. 0r. 21p. Irish plantation measure. The lease contained a covenant not to build any house or cabin on that part of the demised premises adjoining the said road or avenue leading from said high road to the said house of Fairy Hill, nor within fifty yards thereof. The lease having subsequently, by eviction or otherwise, become extinguished, *T. D.* (the successor in title of *W. D.*), by lease dated the 9th October, 1840, demised this holding of 19a. 0r. 21p. to *J. F.* for three lives, with a covenant for perpetual renewal, at the rent of £16. The lands were described in the same way as in the lease of the 6th May, 1805, and the lease contained the same covenants. On the 24th October, 1846, *J. F.* made a lease to a tenant for ten years, at £44 1*s.* 5*d.*, and after its expiration the holding was let to different tenants; and finally, on the 23rd May, 1880, *C.* entered into an agreement with *F.* to become yearly tenant of the 19a. 0r. 21p., at a rent of £1 17*s.* 6*d.* an acre, and agreed not to break up or conacre any part of the holding. *C.* had previously acquired the interest under the lease of the 14th May, 1788, and he subsequently acquired the interest under the lease of the 21st November, 1794, and on these portions of the lands the mansion-house stood, in which he resided. He was a gentleman of good social position, and worked all the lands together:—*Held* (reversing the decision of the Land Commission, FitzGibbon, L.J., *dissentiente*), that the 19a. 0r. 21p. had become detached from the other portion of the demesne of Fairy Hill by the leases of 1805 and 1840, and had become undemesned. *Cheevers, Tenant; Fallon, Landlord* - - App. 407

3. —— *Tenancy from year to year—Land formerly demesne—Undemesning.*] A holding consisting of 40 acres, Irish plantation measure, and a dwelling-house and offices, were let to a tenant by lease, dated the 24th April, 1857, for twenty-one years, at the rent of £110. The lessee was a farmer, holding another farm of 90 acres within 4 miles, and the lease contained no special clauses. The landlord owned another property, which comprised a large mansion and fine demesne, about 10 miles lower down the river Suir. In some of the previous documents dealing with the property the lands were described as "the demesne of *L.*," and in 1822 the lands, described as demesne lands, were let by an owner in fee for three lives or twenty-one years. After the lease expired the holding was unlet for some years. It was then let to several successive yearly tenants. In 1827 it had been put in settlement along with various other denominations of land, which were let to tenants, but the settlement did not comprise the mansion-house and demesne, and did not describe the holding as demesne:—*Held* (reversing the decision of the

DEMESNE LANDS—*continued.*
Land Commission), that the holding had become undemesned. *Mansfield, Tenant; Congreve, Landlord* - - - - - - App. 425

4. —— *Trustees of a charitable institution, landlords—Undemesning—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49).] *M.*, who was possessed of extensive estates in Ireland, including the lands of *N.* in the county of Dublin, held under lease for lives renewable for ever, by his will, dated the 10th March, 1783, devised all his real estates and other property to trustees, including the Lord Primate of Ireland, the Lord Chancellor of Ireland, the Archbishop of Dublin, the Chief Justices of the King's Bench and Common Pleas, the Chief Baron of the Exchequer, and other official persons, for certain charitable purposes. The will was disputed by the heir-at-law, but by an agreement the property was divided between the trustees and him. In the lifetime of *M.* the lands of *N.* were demesne lands; but the property which he devised to the trustees of his will was to be used solely for charitable purposes. While the litigation was pending a lease was made to *A. G.* in 1786 of the lands of *N.*, which were afterwards allotted to the trustees of the charity, and further leases were made by the trustees to *A. G.* and his successors, in whose family the holding had always remained. The last lease was dated the 4th December, 1878, for the term of twenty-one years, and all the leases described the holding as that part of the lands of *N.* "commonly called the mansion-house, garden, and demesne of *N.*" The last lease contained, besides the usual covenants, a covenant that the lessee would reside on the lands, a covenant not to build more than one dwelling-house on the premises, and a covenant not to make any claim for disturbance or improvements. *Held*, by Walker, C., Porter, M.R., and Barry, L.J. (affirming the decision of the Land Commission), *diss.* Palles C.B., and Fitz Gibbon, L.J., that the lands had been undemesned. *Graydon Tenant; Trustees of Morgan's Charity, Landlords;* [App. 513

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FAIR RENT — *Agreement fixing — Tenant for life—Inadequate rent fixed to the prejudice of remainderman and incumbrancer — Fraud — Purchaser of tenant's interest for value and without notice—Application to take agreement off the file—Jurisdiction.*] *T. L. P.*, who was tenant for life of certain lands in the county of Leitrim under a will, by which his life estate was determinable upon bankruptcy, or upon a receiver being appointed, entered into an agreement on the 1st March, 1888, with a tenant *E.* to fix a fair rent of his holding, which comprised 44a. 1r. 25p., at £6 a-year. The rent had previously been £23, and the agreement was filed in the Land Commission on the 11th June, 1888. In September, 1889, *T. L. P.'s* estate became forfeited, and the next tenant for life, *J. L. P.* became tenant for life in possession. On the 28th August, 1889, *E.'s* holding was was sold by public auction, subject to the judicial rent of £6, and R.

FAIR RENT—*continued.*
became the purchaser. On the 25th July, 1893, an application was made by *J. L. P.* and *E. S. P.*, an annuitant, for liberty to intervene, and that the fair rent agreement might be taken off the file and declared null and void. On the 7th November, 1893, an order was made by Mr. Commissioner Fitz Gerald, that the agreement should be removed from the file of the Court. *R.*, the purchaser, was not represented on that application, owing to a miscarriage, and he subsequently applied to the Land Commission to vacate the order of the 7th November, 1893. On the 13th March, 1894, this application was refused, and *R.* appealed: *Held*, that, whatever might have been done in the case of the orignal parties, as between *R.* on the one hand and *J. L. P.* and the annuitant on the other, the orders of Mr. Commissioner Fitz Gerald and of the Land Commission could not be sustained. *Evans, Tenant; Peyton, Landlord* - - App. 127

2. —— *Fee-farm grant set aside—Fine—Land Law* (*Ireland*) *Act*, 1887, *s.* 2—*Land Law* (*Ireland*) *Act*, 1881, *s.* 8.] The Land Commission had, under sect. 2 of the Land Law (Ireland) Act, 1887, set aside two fee-farm grants, on the ground that the acceptance thereof was procured by threat of eviction. The grantees had paid fines to the landlord in order to obtain the fee-farm grants. After the fee-farm grants had been set aside, the tenants served notices to fix fair rents of their holdings: *Held*, that in fixing the fair rents of the holdings it was competent for the Land Commission to have regard to the fines paid by the tenants for the fee-farm grants. *Lanyon, Landlord; Clinton and Kernoghan, Tenants* - - - - App. 150

3. —— *Fee-farm grant—Improvements—Permanent buildings—Reclamation of waste land—Drains and fences — Redemption of Rent* (*Ireland*) *Act*, 1891—*Land Law* (*Ireland*) *Act*, 1887, *sect.* 1—*Land Law* (*Ireland*) *Act*, 1881, *sects.* 8, 21—*Land Act*, 1870, *sect.* 4—*Ulster custom.*] In 1874 *M.* purchased from a tenant from year to year his interest in a holding subject to the Ulster custom. In 1875 *M.* obtained from *L.*, the landlord, a fee-farm grant of the holding. After purchasing the holding *M.* executed improvements on the land, including the erection of permanent buildings, the reclamation of waste lands, and the making of drains and fences. In fixing a fair rent under the provisions of the Redemption of Rent (Ireland) Act, 1891, the Land Commission held that the grantee was not entitled to be exempted from rent in respect of these improvements, and that the Ulster custom was not enforceable under the Act of 1870 against a holding under a fee-farm grant. *Held*, reversing the decision of the Irish Land Commission that *M.* was entitled to have his interest in the permanent buildings and the reclamation of waste lands, but not in the drains and fences, considered in fixing the fair rent, the Court of Appeal giving no decision on the question raised as to the Ulster custom. *Adams* v. *Dunseath* (10 L. R. Ir. 109) discussed. *Mollan* v. *Kieran* ([1894] 2 Ir. R. 27) overruled. *Mairs, Grantee; Lecky, Grantor* - App. 475

4. —— *Judicial rent less than rent reserved by lease—Account not taken of over-payments by tenant—Right of action—New statutory right and statutory remedy — Land Law* (*Ireland*) *Act*, 1887, *s.* 5.] A lessee served an originating notice to fix a fair rent; and, in the interval which elapsed before a judicial rent was fixed, paid gales of the reserved rent. Before the fair rent was fixed, the lessee assigned the lease to a purchaser, and the fair rent proceedings were continued in the name of the assignee. The judicial rent being lower than that reserved by the lease: *Held*, by the Exchequer Division (*diss.* Palles, C.B.) and by the Court of Appeal, that although no account had been taken between the parties, under section 5 of the Land Law (Ireland) Act, 1887, the lessee could maintain an action for the difference between the rent paid by him since the gale-day next after making the application and the judicial rent. The rule that where a statute creates an obligation, and supplies a remedy for its enforcement, that remedy alone must be followed, is subject to this qualification, that the remedy supplied must cover the whole right given. *Stubbs* v. *Martin*
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FEE-FARM GRANT—Ecclesiastical lease—Perpetuity—Redemption of rent 363
See Redemption of Rent. 2.

—— Fair rent fixed in lieu of redemption 475
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—— Set aside—Fine—Fair rent - - 150
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FENCES—Improvements by fee-farm grantee—Fair rent - - - - 475
See Fair Rent. 3

FIERI FACIAS—*Sheriff*—Fi. fa.—*Judgment* de bonis testatoris—*Executor* de son tort—*Chattels real of a deceased*—"*In the hands of the defendant.*"] Under a writ of *fi. fa.*, founded on a judgment *de bonis testatoris* against an executor *de son tort*, the sheriff is authorised to seize and sell the chattels real of the deceased in the possession of the defendant. *Doherty* v. *Nelson* - - - Q.B. 90

—— Interpleader—Sheriff's costs - - 400
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FINE—On fee-farm grant set aside—Fair rent
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FRANCHISE—Parliamentary.
See Parliament.

FRAUD—Agreement fixing fair rent - 127
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—— Misrepresentation in prospectus - 207
See Misrepresentation in Prospectus.

FUTURE TENANT—*Land Law* (*Ireland*) *Act*, 1881—*Tenancy from year to year, existing at the passing of the Act, created by a tenant for life—Remainderman succeeding subsequent to the date of the Act—Acceptance of rent from tenant.*] In 1876 *M.* purchased the interest in a tenancy from year to year in 12 acres of land from *R. J. H.*, who was tenant for life of the property. Later in the same year he acquired a tenancy from year to year in 12 acres, other portion of the same lands, at the rent of £12, from *R. J. H.*, upon payment of a fine of £60. The gale days were January and July. *R. J. H.* died in May, 1886, and was succeeded by *H. P. H.*, as tenant in fee in remainder, who took payment of the rent of the farm from *M.* at the same rate in July, 1886, and subsequently, giving an abatement. There was no express contract between the parties for the creation of a present tenancy. *Held* (affirming the decision of the Land Commission), that *M.* was a future tenant. *Roulston* v. *Caldwell* ([1895] 2 Ir. R. 136) distinguished. *Monaghan, Tenant; Hinds, Landlord* - - - - App. 689

2. —— *Land Law* (*Iveland*) *Act*, 1881—*Tennancy existing at the passing of the Land Law Act*, 1881—*Surrender to the landlord—Reletting of portion of the holding before* 1*st January*, 1883.] *J. H.* held from *T. E.* 14a. 2r. 25p. (Ir.) of the lands of *D.*, in the county of Cavan, under lease dated the 24th January, 1865, for the term of twenty-one years, at the rent of £27 15*s.* 6*d.*; the term was subsequently changed by endorsement on the lease into a lease for the life of the lessee. *J. H.* died in 1876, and was succeeded in the possession of the farm by his widow, *E. H.*, who continued in possession until April, 1882, when she surrendered to the landlord the whole of the farm. The landlord then sub-divided the farm, giving *Mrs. H.* the house and 10 acres, statute measure, at a rent of 10*s.* a year for her life, and the remainder was let to *C.* in three distinct parts :—(*a*) 4½ statute acres, at the rent of £22 10*s.*; (*b*) 4a. 1r. 19p., at a rent of £12; and (*c*) 4a. 1r. 29p., at a rent of £10 10*s.* These lettings were made in 1882, and took effect from the 1st November, 1882. In January, 1890, *G.* sold the holdings *b* and *c* to *F.*, who served a notice to fix a fair rent of the holding *c*:—*Held* (affirming the decision of the Land Commission), that the tenancy in the holding was a present tenancy. *Fitzsimons, Tenant; Ellis, Landlord* [App. 698

—— Lease by mortgagor - - - - 136
See Mortgage.

GATES—Level crossing—Unreasonable delay in opening - - - - - 555
See Level Crossing.

GRAND JURY — *Failure to appoint baronial cess-collector — Powers of collector subsequently appointed.*] A Grand Jury which, during five successive years, had failed to appoint a collector of county cess over a certain barony, appointed the plaintiff at the Spring Assizes, 1894, and thereupon the warrants and applotment books, as well for the five preceding years, as for the Spring Assizes, 1894, were issued to the plaintiff. The plaintiff brought a civil bill against the defendant for county cess payable on foot of said several warrants:—*Held*, on special case stated, that the plaintiff was only entitled to recover the amount applotted upon the defendant on foot of the presentment made at the Spring Assizes, 1894. The duty of a collector of county cess is confined to levying the assessments presented at the Assizes at which he is appointed. *Clarke* v. *M'Geever* - - - Q. B. 460

2. —— *Road contract—Application for payment—Certificate of county surveyor—Power to certify and to present for payment half-yearly for period still incomplete — Power to certify and to present for portion of sum applied for by contractor—Power to re-present for residue*—6 & 7 *Wm.* 4, *c.* 116, *s.* 130.] *D.'s* tender for keeping in repair 1620 perches of road at 11*d.* per perch per annum for five years, from the Summer Assizes, 1893, was accepted and fiated at the said Assizes. In October, 1893, *D.* applied for payment, as for one half-year, of £37 2*s.* 6*d.* Upon this application the county surveyor indorsed his certificate that the work had been "duly executed according to contract to the amount of £35 6*s.* 6*d.*," leaving a balance of £1 16*s.* to be re-presented. At the Road Sessions in November, 1893, this application so indorsed, was allowed, and at the Spring Assizes following the Grand Jury presented the sum of £35 6*s.* 6*d.*, to be paid to the contractor, and re-presented the balance £1 16*s.* A cesspayer obtained a conditional order for a writ of *certiorari* to quash the said presentment and re-presentment on the ground of illegality, it being contended that the county surveyor could only certify for the full amount payable, or not at all:—*Held* (affirming the decision of the Queen's Bench Division), that the order for the writ of *certiorari* must be made absolute, the certificate having been given, and the presentment having been made, in respect of a sum claimed as payable for keeping the road in repair for a period then not yet ended, and therefore being premature:—*Held*, also, that, assuming that the time for payment had arrived, it was legal for the county surveyor to certify for a portion of the amount claimed, and for the Grand Jury to presen such portion and to re-present the residue. *In re Doherty's Presentment* (*County Londonderry Presentments* 1894 - - Q. B. 158; App. 493

GRAND JURY—*continued.*

—— Road contractor—*Ex parte* order to enter upon lands - - - - - 451
See JUSTICES. 3.

GUEST—Occupation as - - - - 359
See LIMITATIONS, STATUTE OF. 1.

HABEAS CORPUS—Custody of infant—Equitable jurisdiction - - - 571
See INFANT.

HIGHWAY—Obstruction of - - 555
See LEVEL CROSSING.

HOLDING—Character of.
See DEMESNE LANDS.
NON-AGRICULTURAL HOLDING.
RESIDENTIAL HOLDING.

—— Purchase by tenant—Land Purchase Acts—Statute of Limitations - - 559
See LIMITATIONS, STATUTE OF. 3.

—— Subject to statutory conditions—Landlord's right to remove timber—Compensation
See TIMBER. [452

HUSBAND AND WIFE — *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75)—*Judgment against married woman for antenuptial debt—Separate estate, with restraint on anticipation—Receiver by way of equitable execution.*] Where a woman married after the 1st January, 1883, is entitled to separate estate restrained from anticipation under a settlement, not being a settlement of her own property made by herself, an ante-nuptial creditor, who has obtained judgment against her in the form settled in *Scott* v. *Morley* (20 Q. B. Div. 120), cannot enforce a judgment, obtained against such woman after marriage, by the appointment of a receiver over such separate estate, or the income thereof. *Kirk* v. *Murphy* (30 L. R. Ir. 508) overruled. *Molony* v. *Harney* - - Q. B. 169

2. —— *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *sect.* 1, *sub-sect.* 2, *sect.* 19—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2—*Separate estate with restraint on anticipation—Judgment for costs against married woman—Equitable execution—Receiver.*] The plaintiff was a married woman, with separate estate subject to a restraint on anticipation. An order was made in the form usual in such cases on October 31, 1893, dismissing the action with costs. A gale of the annuity to which the plaintiff was entitled, subject to the restraint on anticipation, fell due on May 1, 1894. On the same day a Judge in Chambers appointed one of the defendants receiver by way of equitable execution over this gale. The Queen's Bench Division refused to set aside this order; but on appeal:—*Held*, by the Court of Appeal, that there was no power to make the order, and that it should be set aside. Apart from the provisions of the Married Women's Property Act, 1893, a judgment against a married woman cannot be enforced against arrears of her separate estate accruing due subsequent to the date of the judgment, and subject to a restraint on anticipation. Section 2 of the Married Women's Property Act, 1893, does not give power to the Court to alter or vary an order for payment of costs made before the Act came into operation, or to make a new order for payment of the same costs. *Lowry* v. *Derham* - APP. 123

—— Marriage Settlement.
See SETTLEMENT.

IMPRISONMENT—Compulsory absence—Parliamentary franchise, - 541, 551
See PARLIAMENT. 1, 2.

IMPROVEMENTS—Consideration of, in fixing fair rent—Fee-farm grantee - 475
See FAIR RENT. 3.

INFANT—*Custody of*—Habeas corpus—*Judicature* (*Ireland*) *Act*, 1877, *s.* 28 (10).] In proceedings by *habeas corpus* in the Queen's Bench Division in matters relating to the custody and education of infants, the equitable jurisdiction conferred by section 28 (10) of the Judicature (Ireland) Act, 1877, is ancillary to the legal jurisdiction of the Court, and the applicant must still show that he *prima facie* possesses a legal right to the custody. *In re Harper* - - Q. B. 571

INTERPLEADER—*Practice—Summoning order—Sheriff's costs.*] When the sheriff obtains a summoning order in interpleader, and the claim by the third party fails, the sheriff is entitled to have his costs of the order against the execution creditor, and the execution creditor has his remedy for them over against the unsuccessful claimant. *M'Cann* v. *Birch* (2 L. R. Ir. 500) overruled. The former practice of the Exchequer Division adopted. *Todd* v. *M'Keever* - - - APP. 400

JOINT DEBTORS—Compromise with one
See COMPROMISE. [41, 59

JUDGMENT — *Practice—R. S. C. Order XIV., Rule* 1 — *Final judgment motion—Difficult question in law—Difficult questions of fact—Fraud.*] Liberty to mark final judgment on a specially indorsed writ may not be given where difficult questions of fact or difficult questions in law are at issue. *Goodchild* v. *Duncan* - - - - - Q. B. 393

—— Consent—Joint liability - - - 41, 59
See COMPROMISE.

—— *De bonis testatoris* — Fieri facias—Executor *de son tort* - - - - 90
See FIERI FACIAS.

—— Married woman—Restraint on anticipation [123, 169
See HUSBAND AND WIFE. 1, 2.

—— Prior to 15th July, 1850 — Enrolment of assignment—Elegit - - 39
See ELEGIT.

JUDGMENT RECOVERED—Trespass to land—Continuing damage - 294, 313
See Trespass.

JURISDICTION, LAND COMMISSION—Agreement fixing fair rent—Fraud—Setting aside - - - - - 127
See Fair Rent. 1.

—— Purchase Acts - - - - - 559
See Limitations, Statute of. 3.

—— Redemption of Rent Act—Specific performance - - - - - 325
See Redemption of Rent. 1.

JURISDICTION, QUEEN'S BENCH DIVISION—Custody of infant—Judicature Act, 1877, s. 28, sub-s. 10 - 571
See Infant.

JUSTICES—Certiorari—*Dismiss by Justices—*Nemo bis vexari debet pro eadem causa—"*Want and excess of jurisdiction*"—*Bias or interest of Justice adjudicating—Acquiescence—Application by a Judge of his local or scientific knowledge*—Onus *of disproving statutory exceptions* (40 *&* 41 *Vict. c.* 56, *sect.* 78).] *L.* was prosecuted, *in absentia*, before Justices, on a complaint alleging generally that he was on the complainants' railway on a certain date, after having once received warning, contrary to 31 & 32 Vict. c. 119, sect. 23, as amended by 34 & 35 Vict. c. 78, sect. 14. The complaint did not negative the statutory exception in the case of a person being on a railway "for the purpose of crossing the same at any authorised crossing." The trespass actually occurred on a point where the line ran along a lane, which had, at one time, been a public right of way. *M.*, one of the presiding Justices, had an interest in this right of way as a member of the public living in the vicinity; and, some time previously to the prosecution, had been in communication with the complainant Company in regard thereto; they asserting that the right had been lost, as it had not been preserved by the award of the arbitrator under the Board of Trade, appointed to adjust all such claims against the said Company; *M.* considering that the right still existed as before, inasmuch as no alternative way had been provided, and having challenged the Company to institute proceedings against him for trespass in assertion of the right. At the Petty Sessions Court, before this and some other cases in which the complainant Company were interested were called on, a director of the Company asked *M.* to remain and adjudicate; and no objection was afterwards taken during the hearing, when the question of the existence of the right arose. During the hearing of the case the complainants' witness having stated where the trespass occurred, *M.* asked: "Surely that is on the track of the old lane. Is there not a public right of way there?" The witness did not answer, and the complainants' solicitor refused to make any admission, submitting that the defendant was not present, and that no question of such right was raised on his behalf. The defendant, *L.*, a decrepit mendicant, had already, on the same day, been sentenced to fourteen days' hard labour for begging, and had also been fined 2*s.* 6*d.*, at the suit of the Company, for trespass. The complainants gave evidence that the defendant had "received warning," but none negativing the statutory exception mentioned above. When the complainants' case had closed the Justices dismissed the summons on the ground that the case had not been proved. On the motion to make absolute a conditional order for a writ of *certiorari* to remove and quash the order of the Justices upon the ground that it was made without, and in excess of, jurisdiction: *Held* (*diss.* Holmes, J.), that in no case can *certiorari* issue to remove and quash an order of dismissal by Justices. *Per Curiam*, that where it is intended to rely on the bias or interest of a particular Justice as vitiating the proceedings at Petty Sessions, the established and proper practice of the Court is that such bias or interest should be specifically stated as a ground on the face of the conditional order. *Per* Sir P. O'Brien, C.J., O'Brien and Johnson, JJ., that (treating the ground of bias as open on this motion), though *M.* took such an interest, albeit on public grounds, in the case, as to make a real bias reasonably probable, the complainants, by their acquiescence in his sitting and adjudicating on the case, were precluded from relying on this objection. *Per* Holmes, J., that the circumstances disclosed no bias sufficient to disqualify *M.* from adjudicating on the case. *Quære*: The Petty Sessions (Ireland) Act, 1851, sect. 20, sub-sect. 1, providing that if an information or complaint shall negative any exception in the statute on which same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant may prove the affirmative thereof; and the County Officers and Courts (Ireland) Act, 1877, sect. 78, providing that such exception may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived, no proof in relation thereto shall be required from the complainant,—is it incumbent on the complainant, where the complaint does not specify or negative the exemption, to prove the negative thereof? The limits of the right and duty of a judge to use and apply his local or scientific knowledge in reference to a case at hearing before him discussed: *Reg.* (*Giant's Causeway, &c., Tramway Co.*) v. *Justices County Antrim* Q. B. 603

2. —— *Licensing Sessions—Jurisdiction of Court to alter a decision arrived at on preceding day—Rectification of error—Continuity of session.*] At the Licensing Sessions held at Midleton on Octo-

JUSTICES—*continued.*

ber 31st, and November 1st, 1894, an application was made for a spirit license. A preliminary objection to the sufficiency of the notice of application was argued before the Recorder (sitting as chairman) and twenty-three Justices, and decided against the applicant, and the word "rejected" was entered in the book by the Clerk of the Peace. After the hearing and decision of other cases the Recorder—some of the Justices having left the Bench—announced that the Court required the preliminary objection to be re-argued on the following day. Next morning, November 1st, notwithstanding protest, the case was re-opened, the preliminary objection re-argued, the ruling of the preceding day rescinded, and an order made, after examination of witnesses, granting the license to the applicant. On motion to make absolute an order for a writ of *certiorari* to bring up and quash the order of the 1st November:—*Held*, that the motion should be refused. *Per* Johnson, J.: The Court of Annual Licensing Sessions during its sitting has the same jurisdiction as the Court of Quarter Sessions during its sitting to alter its own judgment or order; and the continuity of the Session is not interrupted by the absence or presence of individual Justices other than the statutory Chairman. *Reg.* (*Callaghan*) v. *Recorder and Justices of Cork* - - - Q.B. 350

3. —— *Trespass—Road contractor—Justification under invalid order of Justices—Order made* ex parte—*Grand Jury Act* 1836, *sect.* 162.] An order of a Justice, made *ex parte* without notice or summons, authorizing a road contractor to enter upon lands, is void, and affords no answer to an action for trespass. *Clarke* v. *Clarke* [Gibson, J. 451

—— Appeal—"Next Quarter Sessions" 503
See Appeal.

—— Licensing Acts.
See Licensing Acts.

—— Penalty—Costs—Small Penalties Act, 1873, ss. 3, 4, 6 - - - - - 577
See Penalty.

—— Seed rate—Proceedings to recover - 449
See Seed Rate.

—— Service of summons—Appearance—Waiver
See Parliament. 4. [586

KNOWLEDGE—Local or scientific—Application of by Judge - - - - - 603
See Justices. 1.

LANDED ESTATES COURT CONVEYANCE—*Construction—Schedule of tenancies—Map* ("*and described in the map*")—Falsa designatio—*Landlord and tenant—Encroachment—The Landed Estates Court* (*Ireland*) *Act*, 1858 (21 & 22 Vict. c. 72), *sect.* 61.] *J. O.*, plaintiff's predecessor in title, held 1, a messuage in the town of Galway, under lease, dated the 7th July, 1793, for ninety-nine years, assigned to him by deed, dated the 6th May, 1858. The lease did not state the acreage, but gave the boundaries in front and on each side, the frontage being on Dominick-street, and granted the premises (two houses) "with the ground rearward" thereof "to the watercourse in the said rear." *J. O.* also held, 2, in fee, under a conveyance from the Board of Works, dated the 27th September, 1858, for valuable consideration, a piece of land, stretching between said messuage and the Eglinton canal, which had been meanwhile constructed on the site of the said watercourse, and having a width or frontage to Dominick-street of 16½ feet, and a depth along said canal of 123 feet. This was a strip consisting mainly of land reclaimed or built up out of the "spoil" of the canal. On 2, and a small part of 1, *J. O.*, shortly afterwards, built a house and offices, which, since 1864, had been let to the constabulary, as barracks, at a rent of £42 10*s*. The defendant, *K.*, by a Landed Estates Court conveyance, dated the 8th August, 1878, was granted three parcels of land in the town of Galway, lot 2 being stated to contain 2R. 33P. "situate," &c., "and described in the map annexed, numbered 1, and thereon coloured yellow, with the appurtenances, which premises do not include, and are not intended to include, any portion of the Eglinton Canal." The map was marked as covering the constabulary barracks, the colouring extending to the actual margin of the canal, and including both 1 and 2. The conveyance was made subject to those tenancies only which were set out in the schedule thereto. The schedule set out two tenancies only referable to map 1, namely, the premises subject to the lease of 7th July, 1793, stated to contain 1R. 9⅜P., and premises subject to a lease dated 1860, stated to contain 1R. 23⅝P., making together 2R. 33P. In 1893, on the expiration of the lease of 1793, *K.* obtained a civil bill decree in ejectment for the possession of the constabulary barracks, as being the premises comprised in said lease, *i.e.*, 1. The plaintiff, who had not been a party to these proceedings, now sought to recover possession of the part of the barracks which stood on 2, and for an apportioned part of one year's rent. The Judge at the trial, Palles, C.B., ruled that *K.*, under the conveyance of 1878, had acquired an estate in possession in 2, but that the subsequent possession of the plaintiff, since 1878, entitled her, under the Statute of Limitations, to judgment for possession, the apportioned rent for one year being ascertained at £40. On new trial motion: *Held*, that the Landed Estates Court conveyance of 1878 conveyed 2 as land comprised in the lease of 1793, *i.e.* as part of 1, and in effect conclusively made 2

LANDED ESTATES COURT CONVEYANCE—*continued.*

a part of the leasehold, and therefore the Statute of Limitations did not apply, and that the defendant was entitled to judgment. *Per* Madden, J.: Where the Landed Estates Court, in the performance of its statutory duties, has ascertained any term of a tenancy, and stated that term—not by way of reference to the lease, but positively—in the conveyance, the lease, though incorporated in the conveyance, and capable of being looked at for other purposes, cannot be used to contradict or modify the statement contained in the conveyance. *Semble*, that the facts rebutted the presumption that the land comprised in the deed of 1858 was an encroachment the benefit of which enured to the landlord. *Oliver* v. *Rooney* Q.B. 660; APP. 675

LAND LAW (IRELAND) ACTS—Demesne lands - - - 197, 407, 425, 513
See DEMESNE LANDS. 1–4.

—— Fair rent—Agreement fixing—Fraud 127
See FAIR RENT. 1.

—— Fair rent—Fee farm grant set aside—Fine
See FAIR RENT. 2. [150

—— Fair rent—Overpayments—Account 70, 82
See FAIR RENT. 4.

—— Fair rent—Redemption of Rent Act—Fee farm grant—Improvements - - 475
See FAIR RENT. 3.

—— Future tenant — Acceptance of rent by remainderman - - - - - 689
See FUTURE TENANT. 1.

—— Holding not within Acts—Estoppel - 1
See RESIDENTIAL HOLDING.

—— Holding whether within Acts — Mills — Not rent producing - - - 433
See NON-AGRICULTURAL HOLDING.

—— Present tenant—Lease by mortgagor—Recognition by mortgagee - - - 136
See MORTGAGE.

—— Present tenant — Surrender — Reletting of portion of holding - - - 698
See FUTURE TENANT. 2.

—— Purchase of holding by tenant—Advance—Rentcharge—Statute of Limitations 559
See LIMITATIONS, STATUTE OF. 3.

—— Statutory conditions—Timber—Right of landlord to remove—compensation - 452
See TIMBER.

LANDLORD AND TENANT—Landed Estates Court Conveyance — Description of tenancy—Encroachment - 660, 675
See LANDED ESTATES COURT CONVEYANCE.

—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

—— Lease.
See LEASE.

LANDLORD AND TENANT—*continued.*

—— Tenant not holding under judicial tenancy—Conveyance to landlord of game, including rabbits - - - - - - 704
See RABBITS.

—— Trustees of charitable institution landlords—Demesne lands - - - 513
See DEMESNE LANDS. 4.

LARCENY—*Criminal law—Delivery of chattel under mistake as to its character—Mistake common to both parties—Subsequent fraudulent appropriation.*] The prosecutor owed the prisoner the sum of £2 8*s*. 9*d*. for work done in his employment. The prosecutor, intending to discharge the debt, handed to the prisoner 9*s*. in silver and two notes, both of which were believed, alike by prosecutor and prisoner, to be £1 notes. One of these was a £10 note. There was evidence that, after receiving this note, the prisoner discovered its true value, and fraudulently appropriated it to his own use. On this evidence the jury convicted the prisoner of larceny:—*Held* by Sir Peter O'Brien, L.C.J., Palles, C.B., O'Brien, Andrews, and Johnson, JJ. (*diss.* Murphy, Holmes, Gibson, and Madden, JJ.), that the subsequent fraudulent misappropriation of the £10, previously innocently acquired, did not amount to larceny, and that the conviction should be quashed. *Reg.* v. *Ashwell* (16 Q. B. D. 190) considered. *Reg.* v. *Hehir* - C. C. R. 709

LEASE—Assignment of—Notice - 41, 59
See NOTICE OF ASSIGNMENT.

—— By mortgagor — Recognition by mortgagee—Present tenant - - - 136
See MORTGAGE.

—— Covenant against alienation—Presumption of release—7 Geo. 4 c. 29 - - 504
See COVENANT AGAINST ALIENATION.

—— Ecclesiastical — Perpetuity — Redemption of rent - - - - - - 363
See REDEMPTION OF RENT. 2.

—— Redemption of rent Act—Consent of lessors—Inability to make title - - 325
See REDEMPTION OF RENT. 1.

—— Surrender — Reletting of portion — Present tenant - - - - - 698
See FUTURE TENANT. 2.

—— Timber—Exception—Implied right of entry—Compensation - - - - - 452
See TIMBER.

LEVEL CROSSING—*Railway Company—Unreasonable and negligent delay in opening gates—Obstruction of highway.*] The plaintiff, a medical doctor, whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the servants of the defendant Railway Company in opening the gates

LEVEL CROSSING—*continued.*
at the crossing:—*Held*, that the defendants were liable in damages to the plaintiff for such delay. *Boyd* v. *Great Northern Railway Company* [Ex. 555

LICENSING ACTS—*Certificate for spirit grocer's license—Suitability of premises—Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69), *s.* 9.] On an application to Justices at Petty Sessions for a certificate for a spirit grocer's licence, under the Licensing (Ireland) Act, 1874, sect. 9, the Justices refused the application "on the ground of the unsuitability of the premises, from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." On appeal to Quarter Sessions, the Chairman and Justices refused the application "on the ground of the unsuitability of the premises." The Queen's Bench Division (Sir Peter O'Brien, C.J., *diss.*) refused to award to the applicant writs of *certiorari* and *mandamus* in respect of the said order and his application:—*Held* (Fitz Gibbon, L.J., *diss.*), reversing the judgment of the Queen's Bench Division, that the matters stated as the grounds of refusal in the order of the Justices were not grounds on which the Justices should have refused the applicant a certificate as to the suitability of his premises. *Reg.* (*Marshall*) v. *Justices of the County Tyrone* - - - - - - App. 174

2. —— *Licensed premises — Title — Licensee in occupation of premises after cesser of his estate—Marriage settlemeut—Gift over to wife on bankruptcy of husband—Transfer of license to wife by husband after becoming bankrupt—Application by wife*—6 *Geo.* 4, *c.* 81, *s.* 21—18 *&* 19 *Vict. c.* 114, *s.* 1.] By marriage settlement the lessee of certain premises settled them on himself for life, with remainder to his son for life, or till bankruptcy, with remainder to his son's then intended wife for life, for her separate use. After the death of the settlor the lessor gave a new lease of the premises to the settlor's son, who thereupon built a house on the premises. The son then became bankrupt, and on his bankruptcy his wife took proceedings in the Chancery Division wherein she obtained a decree, declaring the new lease a graft upon the old one, and establishing her title to the premises. In each of the two years next following this decree the husband obtained, in his own name, a publican's license for the house he had built on the premises, but in the third year he indorsed on the licenses what purported to be a transfer thereof to his wife and she applied at the General Annual Licensing Sessions for the county Cork for a transfer of the license. The Recorder and Justices refused this application, on the ground (1) that the husband had not, at the date of the transfer, any interest or property in the license capable of transfer, and (2) that if any such interest or property was vested in him, it should be transferred to his assignees. On a motion by the applicant to the Queen's Bench Division, and subsequently by appeal to the Court of Appeal, for a *mandamus* and *certiorari*:—*Held*, by the Court of Appeal (affirming the decision of the Queen's Bench Division), that, as there had been neither the death of the person licensed, nor his removal from the licensed premises, nor the sale of or assignment of his interest therein by operation of law, or otherwise, after the license sought to be transferred was granted, the applicant was not entitled to claim the license by way of transfer within the provisions of the Licensing Acts. *Reg.* (*Murphy*) v. *Recorder and Justices of Cork* [Q. B. 104; App. 119

—— Annual licensing Sessions — Continuity — Alteration of decision - - 350
See Justices. 2.

LIMITATIONS, STATUTE OF—*Non-adverse possession—Character of occupation.*] The owner of a house allowed his sisters to reside therein, and contributed to their support. He paid the rent and taxes and executed all necessary repairs:—*Held*, that the occupation was in the character of guests and not of tenants at will, and that the Statute of Limitations did not run as against the owner. *Peakin* v. *Peakin* - - Ex. 359

2. —— *Possession of land by next-of-kin of deceased tenant—Character of such possession, whether fiduciary or adverse—Executor* de son tort.] Where a Special Case stated that, on *K.*'s death, in 1864 *K.*'s widow, *B.*, entered into possession of *K.*'s farm and (as a fact) was in possession of one undivided third in her own right, and of the other undivided two-thirds as bailiff for her son, *M.*, then an infant, and that therefore *M.* had, under the statute, acquired a title to said two-thirds share, and that accordingly the Judge, being of opinion that the plaintiff's right, as administrator, was barred by the statute, dismissed the civil-bill appeal in ejectment against *B.* and *M.*, brought by *M'C.*, who had, in 1892, been appointed by the Queen's Bench Division (in an action between *D.* and *M.*) receiver by way of equitable execution over the beneficial interest of *M.* in the assets of *K.*, and who, having in 1893 taken out letters of administration to *K.*, brought this civil-bill ejectment as such administrator; and where the question submitted for the opinion of the Court was whether the plaintiff, as administrator of *K.*, or as such receiver, was entitled to a decree for the entire or any part of said holding:—*Held*, that, upon the findings, the character of the possession of the defendants was inconsistent with any fiduciary relation towards the estate of the deceased, and that the Judge was therefore right in affirming the dismiss. *Mulhern* v. *Dorian* (17 Ir. L. T. R. 74)

LIMITATIONS, STATUTE OF—*continued.* distinguished; *Rankin* v. *M'Murtry* (24 L. R. I. 290) discussed. *MacCormack* v. *Courtenay* Q.B. 97

3. —— *Rentcharge—Advance by Land Commission to enable tenant to purchase holding—Land Law* (*Ireland*) *Act*, 1881, *sect.* 24, *sub-sect* 1 (a), *sect.* 28 —*Purchase of Land* (*Ireland*) *Acts*, 1885 *to* 1891.] An order of the Land Commission, sanctioning an advance to a tenant to enable him to purchase his holding under the Purchase of Land (Ireland) Acts, 1885 to 1891, does not prevent the statute of Limitations from running so as to extinguish a rentcharge issuing out of the lands. The principle of *In re Colclough's Estate* (8 Ir. Ch. R. 330) and *In re Nixon's Estate* (Ir. R. 9 Eq. 7) is not applicable to proceedings in the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1891. The nature and functions of the Land Commission in Land Purchase transactions considered. *In re Bateson's Estate* - - - LAND COM. 559

MAP—Reference to—Landed Estates Court conveyance - - - - 660, 675
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MARRIAGE SETTLEMENT—
See SETTLEMENT.

MISDESCRIPTION — Landed Estates Court conveyance—Tenancy - - 660, 675
See LANDED ESTATES COURT CONVEYANCE.

MISREPRESENTATION IN PROSPECTUS — *Company — Shareholder — Repudiation by plea—Forfeiture of shares.*] A joint-stock Company, formed to work a gold mine, with a capital of £200,000, in shares of 5*s.* each, issued a prospectus announcing a first issue of £200,000, payable 6*d.* on application and 6*d.* on allotment, and no further call that year. The prospectus then (among other things) stated:—"This Company has entered into a contract to acquire the Concession La Victoria, forming part of the well-known mining property of the Victory Gold Mining Company in Venezuela, and will have the special advantage of taking possession of a property which, already proved to be rich, requires only the erection of machinery (tenders for which are about to be invited) to be at once in a position to make returns. It is proposed, in the first instance, to erect a forty-stamp mill, and make additions from time to time as the increased output may render it necessary. An average yield of only 1½ ounces per ton would give a return of 3600 ounces per month, value nearly £14,000, the greater part of which should, owing to the working facilities, be available for distribution as dividends, and (it is not unreasonable to anticipate) the mine should readily and speedily pay dividends to the extent of 100 per cent. Every expert who has visited this property to view its wonderful formation testifies to its wealth, and the consensus of opinion of the many experts is that it must prove to be one of the richest mines in the world." It then stated that the only contracts entered into were one dated the 3rd February, 1890, between the Victory Gold Mining Co., Limited, of the one part, and the City Stock Exchange Co., Limited, of the other part, and one dated the 14th February, 1890, between the City Stock Exchange Co., Limited, of the one part, and Aaron's Reefs, Limited, of the other part. It appeared that this was the fourth Company connected with the mine. In 1882 the Victoria Co. was started for the purpose of working the mine. It never paid any dividend, and was wound up in 1885. The Victory Co. was started in 1886. It never paid any dividend, and was wound up in 1887. The mine was sold to one *B.* for £2000 in cash, the purchaser assuming liabilities for £8000, who re-sold it for £3910, (and £131,000 in shares) to the Victory Gold Mining Co. The Victory Gold Mining Co. never worked the mine, but in 1890 sold a portion of the property on which the mine was situate to the City Stock Exchange Co. for £25,000, to be paid by the plaintiff Company. The City Stock Exchange Co. then sold the same portion of the property to the plaintiff Company for £131,000, which was to be paid by the plaintiff Company. Out of the £50,000 the entire of the first issue, £38,000, was to go to pay the Stock Exchange Co. and the Victory Gold Mining Co. Of the remaining £12,000, £8000 was to go between the same two Companies, leaving £4000 only available as working capital. It was proved that a forty-stamp mill would cost between £20,000 and £30,000. In September, 1890, the defendant, having heard of the Company from a friend who read the prospectus and the reports to him, applied for 100 shares by letter, and enclosed a cheque for £2 10*s.* Not having received any answer the defendant wrote to the Company on the 19th January, 1891, complaining of the fact that he had received no acknowledgment, and demanding the return of his money. On the 22nd January, 1891, the secretary wrote that the letter of allotment had miscarried, but as the allotment had been made it could not be cancelled. On the 27th January, 1891, the defendant wrote, asking for a prospectus of the Company, and also if there were any more shares to be disposed of. On the 2nd February, 1891, he wrote, enclosing a cheque for £2 10*s.* on the allotment, and asking again if there were any more shares to be disposed of. On the 5th March, 1891, a call of 4*s.* per share was made, payable on the 19th March, and notice was given to the defendant. He then made in-

MISREPRESENTATION IN PROSPECTUS—*continued.*
quiries in London about the mine, and, in consequence of what he heard, took no notice of the call. On the 27th April, a letter was written to the defendant, requiring him to pay the amount of the call, £20 4*s.* 2*d.*, and that in the event of his failing to do so his shares would be forfeited. He took no notice of this, and on the 5th May his shares were forfeited, and he received notice of the forfeiture by letter of that date. In an action by the Company for the amount of the unpaid call the defendant pleaded (amongst other defences) that he was induced to become the holder of the alleged shares by the fraud of the plaintiffs, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from the said shares, he repudiated or disclaimed the said shares and all liability in respect thereof, and stated the particulars of fraud relied on:—*Held*, by Walker, C., and by Porter, M.R., (1) that the statements in the prospectus did not amount to a fraudulent statement of fact, or to a concealment of material facts; and (2) that the repudiation of the shares by the defendant by his statement of defence was not sufficient repudiation of liability against the Company, and that judgment should be entered for the plaintiffs. *Held*, by FitzGibbon and Barry, L.JJ., (1) that the statements in the prospectus, being incapable of being accomplished from the terms of the contracts, entered into by the Company and referred to in the prospectus, were fraudulent representations; and (2) that, having regard to the forfeiture of the shares, the defendant's repudiation by plea was sufficient; and that judgment should be entered for the defendant. The judgment of the Exchequer Division (Andrews and Murphy, JJ.) for the defendant accordingly stood affirmed. *Aaron's Reefs (Limited)* v. *Twiss* - - - - - - App. 207

MISTAKE—Delivery of chattel—*Animus furandi*—Larceny - - - 709
See Larceny.

MORTGAGE—*Land Law (Ireland) Act,* 1881—*Present tenancy subsisting at the passing of the Act—Mortgage by owner in fee—Lease by mortgagor after the mortgage, but before* 1881, *without consent of mortgagee—Payment of rent by lessee to mortgagee—Recognition of lease by mortgagee.*] *A. H.*, being seized in fee of lands in the county of *D.*, mortgaged the lands in 1874 in fee to *C.* On the 30th October, 1880, *W. H.*, the successor in title of *A. H.*, made a lease of the lands to *J. R.* for ten years, at a rent of £131, the mortgagees not being parties to the lease, nor assenting to it. On the 1st November, 1884, the mortgagees gave notice to *R.* not to pay the rent due under the lease, or any future rent, to the landlord, and on the 18th April, 1885, they demanded payment from *J. R.* of the half-year's rent due on the 1st November previous, and also required the future rent to be paid to them. Some further correspondence passed between the mortgagees and *J. R.*, in which the parties treated with each other on the basis that the lease was subsisting. On the 29th October, 1890, *J. R.* served a notice to fix a fair rent. The Land Commission, reversing the decision of the Sub-Commission, held that *J. R.* was not a present tenant at the passing of the Act of 1881:—*Held* (reversing the decision of the Land Commission), that the mortgagees had shown an intention to deal with the lessee as holding under a lease, and that he was entitled to a present tenancy existing at the passing of the Act of 1881. *Roulston, Tenant*; *Caldwell and Cust, Landlords* [App. 136

MOTION FOR JUDGMENT—Summary procedure when inapplicable — Difficult questions of law or fact - 393
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NEGLIGENCE—Railway Company—Unreasonable delay in opening gates - 555
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NEW TRIAL—Motion for—Consultation 454
See Taxation of Costs.

NEXT-OF-KIN—Possession of land by 97
See Limitations, Statute of. 2.

NON-AGRICULTURAL HOLDING — *Land Law (Ireland) Act,* 1887—*Land Law (Ireland) Act,* 1881, *section* 58—*Corn-mill and flax-mill demised—Agricultural holding or mill holding.*] A holding may, as a whole, be agricultural in its character, though there be upon it a mill or some other subject which, if taken as a separate entity, is not agricultural, unless the separate non-agricultural entity be a substantial rent-producing factor in the demise. *Boyle* v. *Foster* (30 L. R. Ir. 623) distinguished. *M'Conaghey, Tenant; Gledstanes, Landlord* - - - - - - App. 433
—— Holdings excepted from Land Law Acts
See Demesne Lands.
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NOTICE — Of objection—Form of — Date of signing—Parliamentary franchise - 544
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—— Purchaser without — Fraudulent agreement fixing fair rent - - - 127
See Fair Rent. 1.
—— Third Party - - - - - - 357
See Third Party.

NOTICE OF ASSIGNMENT—*Landlord and tenant — Assignment of lease — Notice in writing—Particulars of assignment*—23 *&* 24 *Vict. c.* 154, *s.* 14.] The notice in writing of the particulars of an assignment of a lease required by section 14 of the 23 & 24 Vict. c. 154 must state the mode in

NOTICE OF ASSIGNMENT—*continued.*
which the assignment is carried out, the parties to the assignment, and the date of the assignment. *Powell* v. *Adamson* - - Q.B. 41; App. 59

OBJECTION—Notice of—Parliamentary franchise—Omission of polling district—Date of signature - - - - 544
See Parliament. 3.

OBSTRUCTION—Highway - - 555
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ORDER—Justices—Road contractor—Entry upon land - - - - 451
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ORDERS, GENERAL, 1891, 19th Jan.—III., R. 7 - - - - - 398
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—— XVI., Rr. 53, 54 - - - - 357
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OVERPAYMENTS—Fair rent—Land Law (Ireland) Act, 1887, s. 5 - - 70, 82
See Fair Rent. 4.

PARLIAMENT—*Registration of voters—Inhabitant occupier—Compulsory absence during part of qualifying period—Imprisonment during portion of a day after conviction—Legal day*—De minimis non curat lex.] A voter was arrested and imprisoned, and on being brought before the magistrate next day was sentenced to imprisonment for fourteen days, with the option of a fine. He paid the fine, and was discharged. The period of his detention did not extend over the entire of any one day:—*Held*, that as the law will not take notice of fractions of a day the voter was not to be deprived of the franchise by reason of his compulsory absence for portions only of two successive days. *Holland* v. *Hagan* - - - - - App. 551

2. —— *Registration of voters—Inhabitant occupier—Compulsory absence during part of qualifying period—Imprisonment on remand without bail—No trial prior to Revision Sessions.*] Patrick Morris was arrested, and remanded without bail to Petty Sessions. At Petty Sessions he was returned for trial (bail being accepted) to Quarter Sessions. His trial had not taken place at the time the Revision Sessions were held:—*Held* (FitzGibbon, L.J., dissenting), that his innocence was to be presumed until his guilt was proved, and that he was not to be deprived of the franchise by his compulsory absence until his guilt was proved. *Charlton* v. *Morris* - - - - - - - App. 541

3. —— *Registration of voters—Notice of objection—Omission of polling district—Date of signing notice—Onus of proof—Evidence.*] In a borough which had been divided into polling districts a notice of objection served on a voter omitted to state the particular polling district to which the voter objected to belonged:—*Held* (affirming the decision of the Revising Barrister), that the notice of objection was bad. The objector could not swear that he signed several notices of objection on the days they purported to bear date, but the notices were duly signed by him before they were served, and they were duly served within the limits of time for giving such notice:—*Held* (reversing the decision of the Revising Barrister), that the general *prima facie* presumption that all documents are made on the day they bear date applies to notices of objection. *Kenny* v. *Kenealy* - - App. 544

PARLIAMENT—*continued.*

4. —— *Representation of the People Act*, 1884 (48 *Vict. c.* 3), *sec.* 9 (3)—*Parliamentary Registration* (*Ireland*) *Act*, 1885 (48 *Vict. c.* 17), *sect.* 3, *Sch. I., Form No.* 34—*Form of Requisition—Description of Property* "*according to the Rate-book*"—*Service of Form—Summary Jurisdiction—Service of Summons—Defendant appearing, and objecting to sufficiency of service*—"*Inmate*"—*Petty Sessions* (*Ir.*) *Act*, 1851, *s.* 12 (3)—*Agent.*] By the Representation of the People Act, 1884, c. 3, sect. 9 (3), and the Parliamentary Registration (Ireland) Act, 1885, c. 17, sect. 3, and Schedule I., Form No. 34, a Form of Requisition may be served "on the person who is the occupier, or rated, or liable to be rated," in respect of any hereditament comprising any dwelling-house within the meaning of the Representation of the People Acts, "or on some agent of such person concerned in the management of such hereditaments," requiring that same be accurately filled up and returned to the Clerk of the Union, under a penalty not exceeding 40*s.* By the Act of 1884 the form may be served in the manner provided in respect to service of notices of non-payment of rates (*i.e.*, under 30 & 31 Vict. c. 102, sect. 28, "delivered to the occupier, or left at his last known place of abode, or with some person on the premises in respect of which the rate is payable.") The statutory form contains a note directing that a copy thereof shall be served in respect of every separate rating, and that the clerk of the union and the collector of rates are required to fill in column 1 thereof "according to the rate-book" before service. It also contains this note:—"The description of the property in the first column should be a copy from the rate-book, and should be filled in by the clerk of the union, and if it is a house numbered in a street should specify the street and number." The form contains three columns. Column 1 is headed "Property in respect of which the person making the return is rated [*or* liable to be rated, *or* occupier];" column 2, "Situation or description of every dwelling-house, as defined by the Representation of the People Acts, forming part

PARLIAMENT—*continued.*

of the property in first column;" column 3, "Surname and other name of every man who was on the 20th July last, and has been up to the date of the return, an inhabitant occupier of any dwelling-house in the 2nd column. The appellant *P.* was owner of numerous rated hereditaments in the town of Rush, and liable to be rated in respect thereof. He had a residence within the county, and had a rent office in the town of Rush. In 1895, a number of Forms of Requisition were prepared by the clerk in respect of these hereditaments by filling in (above the heading of column 1) the words "No. in rate-book, 597" (or whatever the proper number in each case was) and by filling in, in column 1, the words "Rush. Land." The forms were signed by the clerk and the collector, and were directed to the appellant *P.* without further address. They were served by delivery at the said rent office in Rush to *P.*'s estate bailiff, and were subsequently returned, with the words "not known," filled in under the 2nd and 3rd columns, dated, and signed "Francis O'Donnell & Son," *P.*'s agents. Summonses were issued against *P.* for non-compliance with these requisitions, and were served on him by delivery at said rent office to his estate bailiff. When the summonses came on for hearing, *P.*'s solicitor applied for an adjournment, subject to his right to object to the service of the summonses. The Justices, on the adjourned hearing, having convicted the appellant:—*Held*, on Case Stated (*diss.* O'Brien, J.), that the decision of the Justices was wrong; *held*, that the service of the summonses was good service; and (*per* Johnson, J.) that the appellant's appearance cured the defect (if any); *held*, that the service of the Forms of Requisition was bad; and, *per* Harrison, Johnson, and Gibson, JJ. (*diss.* O'Brien, J.), that there was no evidence of authority necessarily to be applied, or expressly given to appellant's agents, so as to make the appellant criminally responsible for the insufficiency of the returns which they had made. *Per* O'Brien, J. (*diss.*), that, though the service of the forms on the appellant was insufficient, the defect was cured by his agents, with his implied authority (which the Court should infer), making a return thereto. *Per* Johnson and O'Brien, JJ., that the description of the property in the 1st column of the Forms of Requisition was sufficient, and the return inaccurate and insufficient. *Palmer, Appellant; Guardians of Balrothery Union, Respondents.* - - - - - Q.B. 586

PENALTY—*Justices—Summary Jurisdiction—"Penalty"—Costs—Petty Sessions (Ireland) Act,* 1851 (14 & 15 *Vict. c.* 93), *section* 22—*Small Penalties (Ireland) Act,* 1873 (36 & 37 *Vict. c.* 82), *sections,* 3, 4, 6.] The Small Penalties (Ireland) Act, 1873, which defines "penalty" as including any sum of money recoverable in a summary manner, and which, by sect. 6, is made to apply to penalties, "including costs," does not thereby authorise the addition of the costs to the penal sum, so as either to extend the power of imprisonment in default of payment, or to exclude the operation of the Act where any costs are awarded in addition to a fine of £5, the maximum penalty under the Act. *Reg.* (*Herbert*) v. *Justices of Kildare* - - - - - - Q.B. 577

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—— Third party — Directions — Costs—Form of order - - - - - - 357
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PRESENT TENANT—Lease by mortgagor—Recognition by mortgagee - 136
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—— Surrender—Reletting of portion of holding before 1st January, 1883 - 698
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PRESENTMENT—Road contract—Period incomplete - - - 158, 493
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—— Release of covenant - - - 504
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PURCHASE OF HOLDING BY TENANT—Rentcharge—Statute of Limitations 559
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PURCHASER WITHOUT NOTICE—Judicial tenancy—Agreement fixing fair rent—Fraud - - - - - - 127
See Fair Rent. 1.

QUARTER SESSIONS—Appeal from Justices—"Next" Sessions - - 503
See Appeal.

—— Continuity—Alteration of decision - 350
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RABBITS—*Trespass in pursuit of game—27 Geo. 3, c. 35—27 & 28 Vict. c. 67—Tenant not holding under a judicial tenancy—Conveyance by tenant to landlord of game, including rabbits.*] Lands were occupied by a tenant of the complainant, not under a judicial tenancy; and the tenant had by deed granted to the complainant the exclusive right to the game on such lands, including rabbits. *C.*, a person not authorised by the tenant or complainant, was found on such lands with nets and ferrets pursuing rabbits. The complainant prosecuted *C.* for, without being duly authorised, entering and being on said lands in pursuit of game:—*Held*, that such prosecution could not be sustained under either of the statutes 27 Geo. 3, c. 35, or 27 & 28 Vict. c. 67. *Hope and others* v. *Callaghan* (24 Ir. L. T. R. 5) distinguished. *Cleary, Appellant; Viscount De Vesci, Respondent* [Ex. 704

RAILWAY COMPANY — Delivery within reasonable time - - - 22
See Carriers.

—— Level crossing—Unreasonable delay in opening gates - - - - 555
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RATES—*Township Commissioners—Urban Sanitary Authority—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), ss. 226, 227—Towns Improvement (Ireland) Act, 1854—Special Act—Limit on rate.*] Town Commissioners, acting under a special Act, which incorporated the Towns Improvement (Ireland) Act, the Gas Works Act, 1847, and certain provisions of the Water Works Clauses Act, 1847, were also the Sanitary Authority of the township. The Special Act provided that the Township rate should not exceed in any year 2*s.* in the £ without the consent of two-thirds of the ratepayers at a special general meeting. The Commissioners, without the prescribed consent, made a Township rate of 2*s.* 6*d.* in the £, not only for sanitary purposes, but for all the purposes of the Special Act:—*Held*, that the rate was bad. *Manly* v. *Young* [Ex. 676 [Aff.]

—— Seed Potatoes Supply Act, 1890—Liability of successive occupier—Time within which summons may be brought - - 449
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REASONABLE TIME—Carriers—Delivery
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REDEMPTION OF RENT—54 & 55 *Vict. c.* 57—*Effect of redemption under—Consent by lessors to redemption—Lease in excess of powers—Inability to make title—Specific performance—Jurisdiction of Land Commission.*] A lessee for a term of years, applying to the Land Commission under the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), is not entitled to a conveyance in fee of his holding, but to an extinguishment of all rent during the residue of his term, with the protection from all superior rents or rentcharges afforded by their redemption under the powers given by sect. 2 of the Act. By deeds, executed on the marriage of *M.* and *N.*, in 1863, lands were vested in trustees, on trust, at the request of *M.* (the wife) and *N.* (the husband), during their joint lives to sell, and with power to the trustees before sale at the like request, to lease for thirty-one years. The trusts of the

REDEMPTION OF RENT—*continued.*

sale moneys, and of the lands until sale, were for *M.* during the joint lives of herself and *N.*, for her separate use, for the survivor for life, and then for the issue of the marriage. In 1870 *M.* and *N.* made a lease of the lands for 200 years. The tenant served an originating notice under the Redemption of Rent (Ireland) Act, 1891, to redeem the rent, and for an advance under the Land Purchase Acts. *M.* and *N.* consented to the redemption, and an order for the same and for an advance was made accordingly. The trustees refused to assist in effecting the redemption, and *M.* and *N.* thereupon informed the tenant that they could not make title or carry out the order. The tenant thereupon applied to the Land Commission for an order for the specific performance by the lessors of the agreement contained in the consent. The leave of the Chancery Division, required by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7, for the exercise of the powers conferred by sect. 63 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), had not been obtained:—*Held*, that the trustees were within their rights in declining to carry out the redemption, and that *M.* and *N.* had no power to compel them; that it was impossible for *M.* and *N.* to carry out the redemption; and that the tenant's application should be refused. *Semble*, even if *M.* had the power of sale conferred on a tenant for life by the Settled Land Act, it would not enable the redemption of the rent to be carried out. *Quære*, whether the Land Commission has any jurisdiction to make an order for specific performance in proceedings under the Redemption of Rent (Ireland) Act, 1891. *Gyles, Lessors; Beausang, Lessee* - - - LAND COM. 325

2. —— *54 & 55 Vict. c. 57—Fee-farm grant made in* 1837—*Church Temporalities Acts—Relation of landlord and tenant.*] A lessee of certain lands under a lease containing a *toties quoties* covenant for renewal also held from his lessor in that lease certain other lands under a tenancy from year to year. The lessee became entitled under the Church Temporalities Acts to a grant in perpetuity of the leasehold lands, and he thereupon under the said Acts obtained from his lessor a grant in perpetuity of the lands comprised in the lease. This grant was made in the year 1837, and included beside the leasehold lands other lands of which the grantee had previously been tenant from year to year, reserving a bulk rent in respect of the entire of the lands, secured by a covenant for payment and a proviso for distress applicable to the whole:—*Held* (*diss.* Fitz Gibbon, L.J.), that the owner of the grantee's interest was not entitled to the benefit of the Redemption of Rent (Ireland) Act, 1891, as no relation of landlord and tenant was created by the grant of 1837. *Semble*, fee-farm grants made under the Church Temporalities Acts, or under the Renewable Leasehold Conversion Act, being fee-farm grants to which there is attached as a statutory incident the right to bring ejectment for nonpayment of rent, and also fee-farm grants made since the Landlord and Tenant Act, 1860, create the relation of landlord and tenant for the purpose of enabling the grantee to claim the benefit of the Redemption of Rent (Ireland) Act, 1891. *Adams, Tenant; Alexander, Landlord* APP. 363

—— Demesne land - - - - 197
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—— Fair rent fixed in lieu of—Fee-farm grant—Improvements by grantee - - 475
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RELEASE—Of covenant—7 Geo. 4, c. 29—Presumption - - - - 504
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RELETTING—Portion of holding—Surrender
See FUTURE TENANT 2. [698

REMITTING ACTION TO COUNTY COURT—*Practice—Action fit and proper to be prosecuted in superior Court—Appeal—Discretion of Court below—Common Law Procedure Act*, 1870, *sect.* 6.] In an action brought to recover damages for personal injuries from the bite of a vicious ass belonging to the defendant it was proved by affidavits that the plaintiff, a boy thirteen years of age, had entered a cowhouse of his employer, in which the ass had been temporarily left by the defendant, tied up in a stall, when the plaintiff was attacked by the ass, which bit him in the leg, dragged him into the manger, and lacerated his leg. The plaintiff had suffered severe injury, part of the bone of the leg had been destroyed, and he had been rendered unable to work:—*Held* (reversing the decision of the Queen's Bench Division, Fitz Gibbon, L.J., *diss.*), that a motion to remit the case to the County Court should be refused. *Curley* v. *Gregan* [APP. 320

2. —— *Practice—Action of contract—Unliquidated damages—Action for breach of contract, claiming a sum not exceeding* £50—*C. L. P.* (*Ireland*) *Act*, 1870, *ss.* 5, 6—*County Courts* (*Ireland*) *Act*, 1877, *s.* 51.] An action of contract, though claiming a sum not exceeding £50 as unliquidated damages for breach, cannot be remitted under section 5 of the Common Law Procedure (Ireland) Act, 1870. *Carroll* v. *Great Northern Railway Co.* [Q. B. 469

RENT—Action for—Joint liability—Release—Indemnity - - - - 41, 59
See COMPROMISE.

—— Action for — Overpayments — Fair rent — Account - - - - 70, 82
See FAIR RENT. 4.

—— Fair—Land Law Acts
See FAIR RENT.

RENT—*continued.*
—— Redemption of
See REDEMPTION OF RENT.

RENTCHARGE — Purchase of holding by tenant—Statute of Limitations - 559
See LIMITATIONS, STATUTE OF. 3.

REPUDIATION — Liability on shares—Fraud - - - - - 207
See MISREPRESENTATION IN PROSPECTUS.

REQUISITION — Parliamentary Registration Act, 1885, sect. 3—Form of—Service 586
See PARLIAMENT. 4.

RESIDENTIAL HOLDING—*Land Law (Ireland) Act,* 1881, *sect.* 58—*Estoppel.*] In 1849 the landlord demised to *C.* 86 acres of land in the county Meath, at a rent of £107. The term of the lease was to be calculated from 1845, since when *C.* had been in possession, and during which time he had improved the house previously upon the lands, so as to make it too good for the holding considered as an ordinary agricultural holding. The valuation of the land was £99, and of the buildings £30. *C.* lived chiefly in Dublin, and managed the holding by a steward. The lessee's interest in the holding was put up for sale by public auction, the advertisements describing the holding as a "charming residence," and adding, "the purchaser will be entitled, on expiration of the lease, to have a fair rent fixed." The landlord's solicitor attended at the auction, having authority to bid £1200 for the interest in the lease. He saw the auctioneer previous to the auction, and told him that the landlord did not take the view that a fair rent could be fixed, that if the auctioneer stated publicly in the auction-room that a fair rent could be fixed, he would have to dissent, but that he did not wish to spoil the sale. The auctioneer thereupon said he would not read the statement in the advertisement. *M.* saw the advertisement, and became the purchaser of the holding at the auction for £1600. On the expiration of the lease *M.* took proceedings to fix a fair rent:—*Held* (by Walker, C., and Fitz-Gibbon and Barry, L.JJ.), that the holding was not a residential holding, so as to be excluded from the Land Law (Ireland) Act, 1881. *Held* (by Sir Peter O'Brien, C.J.), that the landlord was represented by his solicitor at the auction, and that he was prevented from relying on the objection that the holding was a residential holding by the advertisement and what took place at the auction. *Moonan, Tenant ; Marquis Conyngham, Landlord* - - - - APP. 1

RESTRAINT ON ANTICIPATION 123, 169
See HUSBAND AND WIFE. 1, 2.

ROAD—Grand Jury contract—Period incomplete—Presentment - 158, 493
See GRAND JURY. 2.

ROAD—*continued.*
—— Grand Jury contractor—*Ex parte* order to enter upon land - - - 451
See JUSTICES. 3.

SANITARY AUTHORITY—Rate - 676
See RATES.

SEED RATE—*Seed Potatoes Supply Act (Ireland)* 1890 (54 *Vict.* c. 1)—*Summary jurisdiction—Summons — Liability of succeeding occupier—Time within which summons may be brought.*] On complaint before Justices, payment of seeds-rate may be enforced against the successors in occupation of the purchaser, and such complaint may be made, as in the case of poor-rate, at any time after the date of the warrant authorizing collection of same. *Kingston* v. *Barry* - - Q.B. 449

SEPARATE USE—Restraint on anticipation—Judgment against married woman [123, 169
See HUSBAND AND WIFE. 1, 2.

SERVICE—Requisition — Parliamentary Registration Act, 1885, Sched. I., Form 34
See PARLIAMENT. 4. [586
—— Summons—Petty Sessions - - 586
See PARLIAMENT. 4.
—— Writ of summons—Company - 442
See COMPANY.

SETTLEMENT—Publichouse—Limitation over to wife on bankruptcy—Transfer of license - - - - 104, 119
See LICENSING ACTS. 2.

SEVERANCE—Demesne—User as agricultural holding - - - - - 407
See DEMESNE LANDS. 2.

SHARES — Forfeiture — Repudiation by plea—Fraud - - - - - 207
See MISREPRESENTATION IN PROSPECTUS.

SHERIFF—Fieri Facias - - - 90
See FIERI FACIAS.
—— Interpleader—Costs - - - 400
See INTERPLEADER.

SIGNATURE—Date of—Presumption—Burden of proof - - - - 544
See PARLIAMENT. 3.

SPECIAL CASE.
See CASE STATED.

SPECIFIC PERFORMANCE — Consent of lessors to redemption — Jurisdiction, Land Commission - - - 325
See REDEMPTION OF RENT. 1.

SPIRIT GROCER — License — Certificate — Suitability of premises - - 174
See LICENSING ACTS. 1.

STATUTE OF LIMITATIONS.
See LIMITATIONS, STATUTE OF.

STATUTES :—

27 Geo. 3, c. 35.—Preservation of Game - 704
See RABBITS.

6 Geo. 4, c. 81—Excise Duties, s. 21 104, 119
See LICENSING ACTS. 2.

7 Geo. 4, c. 29—Subletting - - - 504
See COVENANT AGAINST ALIENATION.

6 & 7 Wm. 4, c. 116—Grand Juries, s. 130
See GRAND JURY. 2. [158, 493

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16 & 17 Vict. c. 113—Common Law Procedure, s. 33 - - - - - - 442
See COMPANY.

17 & 18 Vict. c. 103—Towns' Improvement 676
See RATES.

18 & 19 Vict. c. 114—Transfer of Licenses of Publichouses, s. 1 - - 104, 119
See LICENSING ACTS. 2.

19 & 20 Vict. c. 102—Common Law Procedure, ss. 15, 16 - - - - 146
See ARBITRATION.

21 & 22 Vict. c. 72—Landed Estates Court, s. 61
See LANDED ESTATES COURT [660, 675
CONVEYANCE.

23 & 24 Vict. c. 154—Landlord and Tenant, s. 14
See NOTICE OF ASSIGNMENT. [41, 59

25 & 26 Vict. c. 89—Companies, s. 62 - 442
See COMPANY.

26 & 27 Vict. c. lxxii—Pembroke Township 676
See RATES.

27 & 28 Vict. c. 67—Game - - - 704
See RABBITS.

27 & 28 Vict. c. 99—Civil Bill Courts, s. 35 97
See CASE STATED.

33 & 34 Vict. c. 46—Landlord and Tenant, s. 4
See FAIR RENT. 3. [475

33 & 34 Vict. c. 109—Common Law Procedure, s. 5 - - - - - - 469
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36 & 37 Vict. c. 82—Small Penalties (Ireland) ss. 3, 4, 6 - - - - 577
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STATUTES—*continued.*

37 & 38 Vict. c. 69—Licensing, s. 9 - 174
See LICENSING ACTS. 1.

40 & 41 Vict. c. 56—County Officers and Courts, s. 51 - - - - - 469
See REMITTING ACTION TO COUNTY COURT. 2.

—— s. 78 - - - - - - - 603
See JUSTICES. 1.

40 & 41 Vict. c. 57—Judicature, s. 28, sub-s. 10
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41 & 42 Vict. c. 52—Public Health, ss. 226, 227 - - - - - 676
See RATES.

44 & 45 Vict. c. 49—Land Law, s. 5, sub-s. 5 452
See TIMBER.

—— s. 8 - - - - - - 150, 475
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—— s. 21 - - - - - - 475
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—— s. 24, sub-s. 1 (*a*) - - - - 559
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—— s. 28 - - - - - - 559
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—— s. 57 - - - - - 136, 698
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—— s. 58 - - 1, 197, 407, 425, 433, 513
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NON-AGRICULTURAL HOLDING.
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45 & 46 Vict. c. 75—Married Women's Property, s. 1, sub-s. 2; s. 19 - - 123, 169
See HUSBAND AND WIFE. 1, 2.

48 Vict. c. 3 — Representation of the People, s. 9 (3) - - - - - 586
See PARLIAMENT. 4.

48 Vict. c. 17—Parliamentary Registration, s. 3; Sched. I. Form 34 - - - 586
See PARLIAMENT. 4.

—— Sched. III. - - - - 544
See PARLIAMENT. 3.

50 & 51 Vict. c. 33—Land Law, s. 1 - 475
See FAIR RENT. 3.

—— s. 2 - - - - - - 150
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—— s. 5 - - - - - - - 70, 82
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54 Vict. c. 1—Seed Potatoes Supply - 449
See SEED RATE.

54 & 55 Vict. c. 57—(Redemption of Rent)
See FAIR RENT. 3. [325, 363, 475
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56 & 57 Vict. c. 63—Married Women's Property, s. 2 - - - - - - 123
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STATUTORY REMEDY - - 70, 82
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SUBLETTING—Covenant against alienation—Presumption of release—7 Geo. 4, c. 29
See Covenant against Alienation. [504

SUCCESSIVE OCCUPIER—Liability to seed rate - - - - - - 449
See Seed Rate.

SUMMONING ORDER — Interpleader — Sheriff's costs - - - - 400
See Interpleader.

SUNDAY—Attendance of witness—Costs 454
See Taxation of Costs.

SURRENDER—Reletting of portion of holding before 1st January, 1883 - - 698
See Future Tenant. 2.

TAXATION OF COSTS—*Practice—Costs, party and party—Costs of noting evidence of witness not examined at trial—Third counsel on trial of action—Costs of attendance of witnesses at the trial from the day fixed for trial until the actual hearing—Sunday intervening—Costs of consultation during progress of motion for new trial.*] While the Taxing Master is not bound to take the direction of counsel in advising proofs as conclusively showing that a witness is material and necessary, the fact of a witness not being examined at the trial is not in itself a sufficient ground for disallowing the costs of taking a note of his evidence for trial. In substantial actions the usual practice in Ireland is that the costs of three counsel at the trial should be allowed on taxation between party and party, and it rests on the objector to show why such costs should be disallowed. In the absence of special reasons, a litigant's witnesses should be in attendance on the day fixed for trial, and from day to day while the case appears in the list for trial until the case is heard, and the costs of such attendance should be allowed. *O'Meara* v. *Barry* Q.B. 454

TENANCY FROM YEAR TO YEAR—Former demesne—Undemesning - 425
See Demesne Lands. 3.

TENANT FOR LIFE AND REMAINDERMAN—Agreement by tenant for life fixing fair rent—Inadequacy—Fraud 127
See Fair Rent. 1.

—— Creation of tenancy by tenant for life—Acceptance of rent by remainderman 689
See Future Tenant. 1.

THIRD COUNSEL—Allowance between party and party - - - - 454
See Taxation of Costs.

THIRD PARTY—*Practice—Third party notice—Directions how to proceed—Liberty to third party to defend—Costs—Form of order—R. S. C. Ir., Order XVI., Rules* 53 *and* 54.] Where an action was brought against a sheriff for wrongfully seizing the goods of the plaintiff, the sheriff being indemnified by the execution creditor, who was brought in as a third party, the Court, upon motion for directions, made an order in the form adopted in *Norris* v. *Beazley* (46 L. J., N. S., C. P. 515). *Macbeth* v. *Buller* - Q.B. 357

TIMBER—*Landlord and tenant—Reservation of timber to lessor—Implied right to enter and remove—Compensation—Statutory tenancy—Land Law (Ireland) Act,* 1881 *sect.* 5, *sub-sect.* 5.] The defendant was a statutory tenant of the plaintiff, subject to the conditions of a lease which excepted timber in the lessor's favour:—*Held*, that the plaintiff had, by implication, a right to enter and remove the timber, and that, in the absence of stipulation, the defendant could not claim compensation for damage necessarily done in giving effect to the exception; and, following *Knox* v. *Baxter* (19 L. R. Ir. 460), that sect. 5, sub-s. 5, of the Land Law Act, 1881, did not alter the plaintiff's contract rights in this respect. *Trimble* v. *Breconridge* - - - - Gibson, J. 452

TIME—Road contract—Presentment—Period incomplete - - - - 158, 493
See Grand Jury. 2.

—— Summons for seed rate - - 449
See Seed Rate.

TOWNSHIP COMMISSIONERS—Sanitary purposes—Rate - - - 676
See Rates.

TRAFFIC ARRANGEMENTS—Reasonableness - - - - - - 22
See Carriers.

TRANSFER—Publican's License 104, 119
See Licensing Acts. 2.

TRESPASS—*To land—Former action for the same act of trespass—Continuing damage*—Nemo bis vexari debet pro eadem causa.] In 1887 the defendants entered upon the bed of a stream, which flowed between the lands of the plaintiff and of an adjoining owner, forming the boundary between them, and they dug holes in, and deepened the bed of, the stream, for the purpose of improving the water supply at their station at *A*. The plaintiff averred that in consequence of the acts of the defendants the water in the stream flowed past his land more rapidly and at a less depth, so that the plaintiff's lands were liable to trespass of cattle. The plaintiff had brought an action against the defendants for trespass, which resulted, on the 24th March, 1892, in a verdict for damages for

TRESPASS—*continued.*
£40, on which judgment was entered. No further acts of trespass had since been committed by the defendants. The present action was brought on the 15th November, 1892, for a continuing lowering of the stream and interference with its natural flow. At the trial the jury found for the plaintiff, with £15 damages, and leave was reserved to either party to apply for judgment:—*Held*, in the Queen's Bench Division, by O'Brien and Gibson, JJ. (*diss.* Harrison and Holmes, JJ.), and by the Court of Appeal, that the plaintiff was entitled to judgment. *Clarke* v. *Midland Great Western Railway Co.* - - - Q.B. 294; App. 313

—— Road contractor—Entry upon land—Void order of Justices - - - 451
See Justices. 3.

TRESPASS IN PURSUIT OF GAME—Tenant not holding under judicial tenancy—Conveyance of game to landlord 704
See Rabbits.

TRIAL, PLACE OF - - - - 386
See Venue in Criminal Cases.

TRUSTEE—*Contract*—*Exclusion of personal liability*—*Salary of chaplain of trustee church.*] The defendants were trustees of a chapel under a trust deed, which authorized them from time to time to appoint a chaplain and to fix his salary, and to pay such salary out of certain funds vested in them, and out of pew-rents and collections. In 1885 the defendants held a meeting, and by resolution fixed the chaplain's salary at £250 per annum, payable out of the trust funds, and appointed the plaintiff to be chaplain. By the direction of the trustees one of their number then wrote to the plaintiff stating that he had been elected at the stipend of £250. The defendants subsequently formally nominated the plaintiff to the Archbishop for induction. The instrument of nomination recited the plaintiff's appointment at £250 per annum, chargeable on the income of the trust fund provided that the funds reached said amount. The plaintiff acted as chaplain until 1891, when he resigned. At this date, owing to the falling off of income, a considerable arrear of salary remained still unpaid. For this arrear the plaintiff sued the defendants as upon a personal contract:—*Held*, that the plaintiff must fail, there being no evidence to show that any relation of employer and employed existed between the plaintiff and the defendants, or that there was any special contract under which the defendants became personally liable for the plaintiff's salary. *Wright* v. *Day* [Q.B. 337

TRUSTEE—*continued.*
—— of charitable institution, landlords—Demesne lands - - - - - 513
See Demesne Lands. 4.

UNDEMESNING - - 407, 425, 513
See Demesne Lands. 2–4.

VENUE IN CRIMINAL CASES—*Criminal law*—*Procedure*—Certiorari—*Fair trial*—*Crown solicitor's rules.*] When a probability of the existence of prejudice to a substantial extent is established in relation to a county, the Court, in the exercise of its discretion, should not allow the fair and impartial trial of a prisoner to depend upon the power of the officials representing the Crown to order jurors to stand aside, but should remove the proceedings by writ of *certiorari*. *Reg.* v. *Boughton* - - - - Q.B. 386

WAIVER—Defective service of summons—Petty Sessions - - - 586
See Parliament. 4.

—— Disqualification of adjudicating Justice—Bias or interest - - - - 603
See Justices. 1.

WASTE LANDS—Reclamation—Improvements by fee-farm grantee—Fair rent - 475
See Fair Rent. 3.

WITNESS—Noting evidence—Attendance—Sunday - - - - - 454
See Taxation of Costs.

WORDS—"According to the Rate Book"—48 Vict. c. 17, Schedule I., Form 34 586
See Parliament. 4.

—— "Next Quarter Sessions"—14 & 15 Vict. c. 93, s. 24 - - - - 503
See Appeal.

—— "Penalty"—36 & 37 Vict. c. 82, ss. 3, 4, 6
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—— "Suitability of premises"—37 & 38 Vict. c. 69, s. 9 - - - - 174
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WRIT OF SUMMONS—Excessive claim for costs—Costs of motion to set aside 398
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THE END.